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Supreme Court, U.S.
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No. 86-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

PAT S. HOLLOWAY,

Petitioner,

v.

JUDGE DEE BROWN WALKER, ET AL.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

PETITION FOR WRIT OF CERTIORARI

LAURENCE H. TRIBE
Counsel of Record
BRIAN KOUKOUTCHOS
1525 Massachusetts Avenue
Cambridge, Massachusetts 02138
(617) 495-1767

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BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS

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QUESTIONS PRESENTED

1. Where a state trial court has conspired with a litigant to deprive the opposing party of his property in a sham trial, does the availability of a postdeprivation appeal render the Due Process Clause inapplicable and 42 U.S.C. § 1983 unavailable?

2. In declining to make a federal case of every tort by a state employee, has this Court *sub silentio* overruled a century of precedents holding that official abuse of state authority may violate due process whether or not the state's own system of remedies is constitutionally adequate?

PARTIES TO THE PROCEEDING

The abbreviated caption of this case omits several parties named as defendants in Petitioner Holloway's complaint who are Respondents here: Jane H. Browning, Michael G. Starnes, Catherine Agnes Land Starnes, Kathryn Louise Browning Cook, Averille Adams Browning, William Webb Browning III, Winifred Fallon Browning, Robert Holland Browning and the Estate of William W. Browning, Jr. (the "Browning Interests"); G.H. Kelsoe, Jr. and R. Jack Ayres, Jr. (attorneys for the Browning Interests); John Wright (the receiver appointed by Judge Walker), Whitley R. Sessions, J.R. Hurt, Fairway Land Co., Fayette Oil Co., AMCAP Petroleum Associates-1977, AMCAP Petroleum Associates-1979B, American Hawk Oil Co., American Falcon Oil Co., American Eagle Oil Co., American Heron Oil Co., American Wren Oil Co., American Raven Oil Co., Harper Oil Co., Jeffrey Weiss, Donald Ginsberg, and American Petroleum Partners.

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OPINIONS BELOW

This petition seeks review of a decision of the United States Court of Appeals for the Fifth Circuit, which is reported at 784 F.2d 1287 and reprinted as Appendix A.[1] The Fifth Circuit's opinion and order denying rehearing, in which the court below addressed the circuit conflicts, is unreported and reprinted as Appendix F. The memorandum opinions of the United

[1] References to the appendices will be styled "A ___."

States District Court for the Northern District of Texas, Dallas Division (Sanders, J.), are unreported and reprinted as Appendices B, C, and D. The decision of the Fifth Circuit holding Respondent Walker absolutely immune from liability under 42 U.S.C. § 1983 is reported at 765 F.2d 517 (*cert. denied,* 106 S.Ct. 605) and reprinted as Appendix E. The judgment sought to be reviewed is reprinted as Appendix G.

JURISDICTION

The decision and judgment of the Court of Appeals were entered on March 19, 1986. A timely petition for rehearing was denied on May 30, 1986, and the mandate issued on June 9, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

The Fourteenth Amendment to the United States Constitution provides in relevant part:

> "No State shall . . . deprive any person of life, liberty, or property, without due process of law. . . ."

42 U.S.C. § 1983 provides:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United

States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunties secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceedings for redress."

STATEMENT OF THE CASE

The relevant facts are simple and, since this petition arises from the dismissal of a complaint, they are also undisputed.[1] Petitioner Pat Holloway and his oil companies (Humble Exploration Co., Inc., *et al.*) were defendants in a Texas state court lawsuit seeking damages and a constructive trust. The plaintiffs, their attorneys, and others conspired with the presiding judge, Judge Dee Brown Walker, "to rig the outcome of the trial." (A25). Judge Walker "abused his office by imposing a receivership on Humble, appointing an incompetent administrator, and largely wrecking the corporation in accordance with the aims of the conspiracy." (A44).[2] The United States Court of Appeals for the Fifth Circuit "treat[ed] the complaint as alleging both bribery and conspiracy." (A47). The conspiracy

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[1] The courts below did "not go outside the pleadings . . . [and] accept[ed] all well pleaded facts as true and view[ed] them in the light most favorable to the plaintiff." (A44).

[2] The complaint specifically alleges that Judge Walker arranged to have the suit against Holloway "brought before his court contrary to the usual procedure of assigning cases, . . . that he imposed receiverships on Humble's and Holloway's assets, defied a mandamus order of the Texas Court of Appeals to refrain from interfering in Humble's business, appointed an incompetent receiver for Humble, dismissed many Humble personnel, posted [armed] guards at Humble's headquarters to seize the building, and, in a hotel near the courthouse, conducted meetings regarding Humble's business, all in furtherance of the conspiracy." (A47).

was furthered by "regular *ex parte* meetings" during the course of the trial between Judge Walker and counsel for the state court plaintiffs — "to which [Petitioner's] counsel were not invited" (A34) — including a meeting at which Judge Walker "announced the decision to submit jury issues on 'our' theory of the case." (A35).[3] When the state court jury nevertheless returned a verdict in favor of Holloway and his companies,[4] Judge Walker, in furtherance of the conspiracy, took the case from the jury and entered judgment *non obstante verdicto* against Holloway and his companies for $72 million in damages,[5] and placed all of Holloway's and his companies' assets — including Holloway's residence, his inheritance, and many of his personal effects — in a constructive trust for the plaintiffs.[6]

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[3] Before the case went to the jury, Judge Walker retained attorney Robert Hughes to represent him in settlement negotiations then proceeding between the parties. (Hughes was paid by Judge Walker out of the funds of Petitioner's oil companies that the judge had placed in receivership.) Based on his attendance at these *ex parte* meetings, Hughes concluded "that the Court and plaintiff's counsel . . . were in one accord and that real settlement negotiations were a sham." Affidavit of Robert Hughes, First Circuit Record Excerpts Exh. P.

[4] Specifically, the jury found that Holloway had *not* agreed to hold the shares of Humble Exploration Co. issued in his name for the use and benefit of the Browning Interests (the plaintiffs in the state action) and that Holloway had *not* defrauded the Browning Interests. The jury further concluded that the Browning Interests were entitled to no damages whatsoever. Special Jury Issues Nos. 1, 5, 83.

[5] The statement in the opinion of the court below to the effect that exemplary damages were awarded against Petitioner is incorrect. (A4). The amended judgment filed by Judge Walker on November 11, 1982, awarded $72 million in compensatory damages only.

[6] The Texas Court of Appeals vacated an earlier, pre-judgment receivership as a "judicial interference in the affairs of the parties in litigation," *Humble Exploration Company, Inc.* v. *Fairway Land Company*, 641 S.W.2d 934, 944 (Texas Ct. App. — Dallas 1982), but Judge Walker maintained that receivership in direct defiance of a writ of prohibition issued by that court. *Id.* at 946; A60-61. That writ has no application to the constructive trust imposed by Judge Walker as part of the judgment.

Holloway appealed the judgment to a Texas appellate court and filed this action under 42 U.S.C. § 1983 in federal district court seeking damages and injunctive relief against Judge Walker, the state court plaintiffs, their attorneys, and the others in conspiracy with them.[7] The district court ruled "that a genuine issue of material fact existed as to whether defendants had violated [Holloway's right to a fair trial] through a conspiracy with [Judge] Walker." (A7; A35, A41).[8]

Relying on its decision in *Sparks* v. *Duval Ranch Co.*, 604 F.2d 976 (5th Cir. 1979) (en banc), *aff'd sub nom. Dennis* v. *Sparks*, 449 U.S. 24 (1980) (A50), the Fifth Circuit dismissed the claims against Judge Walker on the basis of judicial immunity, because "[a]ll of the harms Judge Walker is claimed to have caused are alleged to have been perpetrated by him through judicial acts not performed in the clear absence of all

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[7] The notice of appeal in Texas was filed on November 24, 1982. The federal civil rights complaint was filed on November 18, 1982.

[8] A motion for summary judgment, based on the supposed insufficiency of evidence of involvement in the conspiracy, was granted by the district court with regard to the Browning Interests. (A8). This ruling was appealed, but the Fifth Circuit never reached the issue, since it upheld dismissal of the entire complaint for failure to allege a constitutional violation. (A16 n.3). But the Fifth Circuit would have to reach that issue upon remand were this Court to reverse the judgment below. The Brownings are therefore included among the Respondents here.

In any event, fairness to all the parties requires that the Brownings be allowed to participate in these proceedings. As a result of the trial conducted by Judge Walker, the Brownings were awarded damages against Petitioner and were also made the beneficial owners of the assets of which Petitioner was deprived. Any eventual recovery of those assets by Petitioner, as part of the equitable relief he seeks herein under § 1983, would come at the expense of the Browning Interests. Even assuming *arguendo* that the Brownings did not directly participate in the conspiracy alleged here, nevertheless they cannot be analogized to third-party bona fide purchasers who received Holloway's assets in ignorance of the uncertainty as to their rightful ownership.

jurisdiction." (A53).[9] The Fifth Circuit specifically held that Judge Walker acted exclusively "in his judicial capacity" (A57), and deemed it "irrelevant" that Judge Walker was alleged to have "misuse[d] . . . his court's power to issue injunctions and place the parties before him into receivership." (A55). Even if those acts were taken "pursuant to a bribe or a conspiracy[,] they remain 'judicial acts.'" (A55).[10]

The district court subsequently granted the defendants' motions for summary judgment on the basis of this Court's opinions in *Parratt* v. *Taylor*, 451 U.S. 527 (1981), and *Hudson* v. *Palmer*, 468 U.S. 517 (1984), holding that "the alleged conspiracy by the state court judge to deprive [Petitioner and his companies] of their property constituted a random and unauthorized act by a state employee." (A9-10).[11]

On appeal, the Fifth Circuit likewise applied *Parratt* and *Hudson* to hold that Holloway had failed to state any violation of his substantive or procedural constitutional rights. The court below reasoned that the state action causing the deprivation of Holloway's due process rights, including his right to a fair trial before an impartial judge, was incomplete in view of his theoretical opportunity to appeal under state law. (A12).[12] Even

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[9] The Texas Court of Appeals' writ of prohibition "did not purport to determine that Walker's court was without general subject matter jurisdiction," but merely "that he was acting in excess of that jurisdiction in continuing to conduct proceedings in the face of an effective order to desist." (A54; *see also* A55 n.4).

[10] This Court declined to review the Fifth Circuit's judicial immunity ruling. 106 S.Ct. 605 (1985) (White, J., would have granted certiorari).

[11] The full account of the procedural complexity of this protracted litigation, while of obvious interest to the parties themselves, is not relevant to the question presented by this petition. A more detailed account of the history of this case and the related actions can be found in the opinion below (A2-8) and in *Browning* v. *Navarro*, 743 F.2d 1069, 1071-73 (5th Cir. 1984).

[12] The word "theoretical" must be stressed inasmuch as the Texas appellate system was in fact withheld from Holloway. When the state court plaintiffs brought suit in federal court to enforce their state court judgment, Holloway

though, by virtue of the Fifth Circuit's own holding, it was *res judicata* that Judge Walker had acted exclusively in "his judicial capacity" (A57); that "the precise act complained of was a normal judicial function" (A55; A57); and that Judge Walker was "empowered to conduct proceedings of the sort he conducted" (A54), the court below nonetheless ruled that any property deprivation suffered by Holloway had not occurred pursuant to "an established state procedure" (A13) but pursuant to "a random and unauthorized act of a state employee." (A13). Since the state cannot know in advance which of its judges will succumb to a bribe, the Fifth Circuit deemed a conspiracy such as that alleged here to be "random" by definition. (A61). As the court below saw the matter, there can be no constitutional violation where "a state system as a whole provides due process of law," and where the most that can be said is that a particular individual clothed with the judicial authority of the state abused his office. (A65). For the Fifth Circuit, a § 1983 plaintiff cannot state a due process violation by alleging an "affirmative abuse of power" even in the course of a "*deliberate* decision of governmental officials to deprive [him] of life, liberty, or property," *Daniels* v. *Williams*, 106 S.Ct. 662, 665 (1986) (original emphasis), but can do so only by alleging that the corruption or abuse of power by which

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raised as a defense the argument that the state trial before Judge Walker had violated the terms of a prior bankruptcy court order remanding the case for trial in the Texas courts. On appeal from that state trial court judgment, the Texas Court of Appeals concluded that Holloway's decision to raise that argument defensively in federal court rather than before Judge Walker was sufficient, under the Texas doctrine of election of remedies, to bar him from further relief under state law. Holloway's appeal was accordingly dismissed. *Humble Exploration Co.* v. *Browning*, 677 S.W.2d 111 (Tex. Civ. App. — Dallas 1984, writ ref'd n.r.e.), *cert. denied*, 106 S.Ct. 1376 (1986). Thus, Petitioner was denied access to the Texas appellate courts because he was deemed to have "elected a federal remedy" when he attacked the state trial judgment *by way of a defense* in a federal court into which, as a would-be state appellant, he had been involuntarily haled. *See* n.31 *infra*.

he has been victimized "'represent[s] official state policy.'" (A12).

The Fifth Circuit acknowledged, as it had to on this record, that this case is "factually similar" to *Dennis* v. *Sparks*, 449 U.S. 24 (1980) (A65),[13] a case which the court of appeals had previously found controlling on the immunity issue. (A50-51). Yet the court below nonetheless deemed itself free to ignore the unanimous holding of *Dennis* that a § 1983 suit lies against those who conspire with a state judge. The Fifth Circuit dismissed *Dennis* as "inapposite" because it "antedated the *Parratt/Hudson* rule entirely and discussed only the issue of whether private parties who conspired with an immune state court judge had acted 'under color of state law.'" (A65). The court of appeals acknowledged but declined to follow the decisions of other circuits reading the *Parratt/Hudson* line in a decisively narrower fashion. (A60-63).[14]

REASONS FOR GRANTING THE WRIT

Eight days before it handed down the decision in *Hudson* v. *Palmer*, this Court unanimously reaffirmed its unanimous decision in *Dennis* v. *Sparks*. *See Tower* v. *Glover*, 467 U.S. 914, 920 (1984). Yet the Fifth Circuit Court of Appeals now takes it upon itself to ignore the import of *Dennis* by treating *Parratt* and *Hudson* not as limiting the extravagant federalization of tort law, but as providing a new starting point for analysis about § 1983's core application to the official abuse of state power.

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[13] In truth, the cases are virtually indistinguishable. *See* pp. 9-10 *infra*.

[14] *See Patterson* v. *Coughlin*, 761 F.2d 886 (2d Cir. 1985), *cert. denied*, 106 S.Ct. 879 (1986), and *Bretz* v. *Kelman*, 773 F.2d 1026 (9th Cir. 1985) (en banc), discussed in Part III *infra*.

Dennis should not be so cavalierly brushed aside — especially given the remarkable similarity between its facts and those of the case at hand. The federal plaintiffs in *Dennis* filed their § 1983 complaint against private parties who had allegedly conspired with a Texas trial juge to injure plaintiffs' property interests in certain oil leases by corruptly issuing an injunction. 449 U.S. at 25-26. In *Dennis*, as here, the state provided an appellate remedy; indeed in *Dennis*, the corruptly issued injunction had been "dissolved by an appellate court as having been illegally issued" before the § 1983 action was filed. *Id.* at 25. In *Dennis*, as here, the state trial judge was immune from suit under § 1983 because, as here, "the challenged conduct [was] an official judicial act." *Id.* at 29. It followed that the "[p]rivate parties who corruptly conspire[d] with [the] judge [were] . . . acting under color of state law," *id.*, and the Court in *Dennis* took it for granted that they could accordingly be sued under § 1983 for violating due process, notwithstanding the availability of state appellate relief from the corrupt trial court decree. In so holding, the Court relied upon the profound "benefits of providing [an independent federal] remedy against those private persons who participate in subverting the judicial process and in so doing inflict injury on other persons." *Id.* at 32.

It is indeed true that *Dennis* discussed "only" the "under color of state law" issue, as the court below observed. But in holding that the private co-conspirators of the state trial judge acted under color of state law, and did so notwithstanding the availability of state appellate review, this Court implicitly recognized that the property loss worked by the conspiracy necessarily constituted a completed deprivation *by the state* without due process of law. Otherwise the Court would have been engaged in a pointless academic exercise. For there would have been no point in finding the private co-conspirators to have acted under color of state law if, in any event, no § 1983

action would lie inasmuch as the state appeals court had already prevented any deprivation from ripening into a due process violation. The case at hand must therefore be decided "in the shadow" of *Dennis*. *Cf. Mitchum* v. *Foster*, 407 U.S. 225, 231 (1972).

The Fifth Circuit's conclusion that the Due Process Clause is satisfied by the availability of a postdeprivation appeal whenever a state trial court has conspired with litigants to deprive someone of his property not only is at odds with *Dennis*, but is wholly unsupported by the *Parratt/Hudson* line relied on by the court below. *Parratt* and *Hudson* hold only that no predeprivation hearing is constitutionally required where circumstances make it impossible or impracticable to provide one. *See Parratt*, 451 U.S. at 541; *Hudson*, 468 U.S. at 531-33.[15] Since a state cannot predict when a mail clerk might inadvertently lose a prisoner's hobby kit, nor forecast and control "in advance the random and unauthorized intentional conduct of its employees," it is an unremarkable conclusion that "predeprivation procedures are simply 'impracticable' " in such circumstances and that deprivation without those procedures does not offend the Constitution. *Hudson*, 468 U.S. at 553.[16] Indeed, in both *Parratt* and *Hudson* this Court

[15] While the Court may want to elaborate on the "random and unauthorized act" language which has caused confusion among the circuits, *compare Holloway* (A61) ("From the point of view of the state, a conspiracy among its employees can indeed be a random act") with *Bretz* v. *Kelman*, 773 F.2d 1026, 1031 (9th Cir. 1985) ("By definition, a conspiracy . . . cannot be a random act"), it is crucial to emphasize that no particular view of that phrase need be taken to avoid the sweeping implications given *Parratt* and *Hudson* by the Fifth Circuit. A conspiracy between private individuals and a presiding judge to subvert a state trial proceeding and to deprive other individuals of their property goes beyond any conceivable elaboration of "random and unauthorized" as those terms are used in *Parratt* and *Hudson*. *See* n.24.

[16] In this sense, as the Court itself expressly recognized, *Parratt* and *Hudson* are consistent with the line of cases such as *North American Cold Storage Co.* v. *Chicago*, 211 U.S. 306 (1908) (upholding state power to seize and destroy

expressly distinguished cases in which the "loss of property is occasioned by . . . an established state procedure," *Hudson*, 468 U.S. at 532; *see also Parratt*, 451 U.S. at 537-38, such as judicial trust settlement, driver's license revocation, prejudgment replevin, *id.*, or, as in this case, a trial.

Parratt and *Hudson*, like the Court's earlier decisions in *Paul* v. *Davis*, 424 U.S. 693 (1976), and *Ingraham* v. *Wright*, 430 U.S. 651 (1977), and like the more recent decisions in *Daniels* v. *Williams*, 106 S.Ct. 662 (1986), and *Davidson* v. *Cannon*, 106 S.Ct. 673 (1986), embody the Court's determination that the Fourteenth Amendment "does not purpose to supplant traditional tort law in laying down rules of conduct to regulate liability for injuries that attend living together in society." *Daniels*, 106 S.Ct. at 666. Those cases are uniformly distinguished from the case at hand by this Court's consistent policy of "not 'open[ing] the federal courts to lawsuits where there has been no affirmative abuse of power.'" *Daniels*, 106 S.Ct. at 664-65 (*quoting Parratt*, 451 U.S. at 549 (Powell, J., concurring in result)). Section 1983 "was enacted to deter real *abuses* by state officials in the exercise of governmental powers," *Parratt*, 451 U.S. at 549 (Powell, J., concurring in result) (original emphasis). It could hardly be more obvious that in this case, as the Fifth Circuit itself stated, "[t]he complaint alleges that [Judge] Walker and the other defendants conspired to seize control of Humble through the *abuse of Walker's judicial office*." (A47) (emphasis added).

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unwholesome food without a prior hearing), and *Fahey* v. *Mallonee*, 332 U.S. 245 (1947) (permitting immediate seizure of property without prior hearing when competence of a bank's management is in great doubt). "These cases recognize that either the necessity of quick action by the state or the impracticability of providing any meaningful predeprivation process, when coupled with the availability of some meaningful [postdeprivation process] can satisfy the requirements of procedural due process." *Parratt*, 451 U.S. at 539; *see also Hudson*, 468 U.S. at 531-32.

It is a far cry from the proposition that one should not make a federal case out of every tort committed by someone on a state payroll to the announcement that the Fourteenth Amendment has nothing to say about conspiratorial subversion of a state's *trial* machinery so long as the state's *appellate* system remains open and uncorrupted. It is inconceivable that this Court, which took pains to distinguish genuine abuses from garden-variety torts, would have embraced so radical a view without expressly saying so — and without, at some length, saying why. After all, this Court has unanimously acknowledged that § 1983 was enacted in part to enforce the Fourteenth Amendment against state courts because those tribunals, which "were being used to harass and injure individuals," were sometimes themselves "in league with those who were bent upon abrogation of federally protected rights." *Mitchum, supra,* 407 U.S. at 240. Were the *Hudson* extension of *Parratt* to have gone so far as to repudiate this understanding of the Amendment, it is unthinkable that it could have been unanimous. In any event, for a circuit court to attribute so extreme a holding to decisions that by their own terms demand a narrower reading — and have been given just that by other circuits — is singularly inappropriate and surely calls for plenary review by this Court.

I. THE JUDGMENT BELOW IGNORES A CENTURY OF PRECEDENT HOLDING THAT ABUSE OF STATE POWER MAY VIOLATE THE FOURTEENTH AMENDMENT EVEN WHERE THE STATE PROVIDES ADEQUATE PROCEDURES FOR REVIEW AND REDRESS.

The court of appeals held that "*Parratt/Hudson* establishes that no federal constitutional due process violation" can flow

from the conspiratorial subversion of a state trial so long as some means of appellate redress remains available. (A63). The Constitution, according to the Fifth Circuit, requires only that "a state system *as a whole* provide[ ] due process of law." (A65) (emphasis added). The court of appeals evidently believes that the Fourteenth Amendment speaks not to state actors but solely to the states as states, and that a state need not answer in federal court for the acts of its agents unless and until it has embraced and endorsed their conduct. Whatever the merits of this view of the Fourteenth Amendment as an original matter, it is a view that this Court decisively repudiated more than a century ago.

In *Ex parte Virginia*, 100 U.S. 339, 347 (1880), this Court declared that the prohibitions of the Fourteenth Amendment operate "not upon the abstract thing denominated a State, but upon the persons who are the agents of the state," for a "State acts by its legislative, its executive, or its judicial authorities. It can act in no other way." At least since *Home Telephone & Telegraph Co.* v. *Los Angeles*, 227 U.S. 278 (1913), the "settled construction of the Amendment [has been] that it presupposes the possibility of an abuse by a state officer or representative." *Id.* at 287.[17] In that watershed case, the Court emphatically rejected the claim that acts in violation of state law were not cognizable as violations of the Fourteenth Amendment "until by the final action of a state court of last resort the act of a state officer has been declared rightful and to be the lawful act of the State as a governmental entity." *Id.* at

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[17] In his opinion for the Court in *Home Telephone*, Chief Justice White exploded the assumption "that the Amendment virtually contemplates alone wrongs authorized by a State." 227 U.S. at 288. Indeed, abuse of public power in contravention of both the Fourteenth Amendment and state law "was more normally to be contemplated" than the possibility "that States acting in their governmental capacity in a complete sense may do acts which conflict with [the Amendment's] provisions." *Id.*

285.[18] Thus, "where an officer or other representative of a State in the exercise of the authority with which he is clothed misuses the power possessed to do a wrong forbidden by the Amendment, inquiry concerning whether the State has authorized the wrong is *irrelevant*." *Id.* at 287 (emphasis added).

With all due respect, the Fifth Circuit's use of the *Parratt/Hudson* "random and unauthorized" conduct standard to reach a contrary conclusion borders on the absurd.[19] In pointing out that Petitioner did not allege "that Judge Walker's conspiratorial acts 'represented official policy' " (A12), the court below did little to advance its argument.[20] For the question is not whether Judge Walker was "authorized" to take a bribe or to engage in a conspiracy, but whether the harms he visited upon Petitioner were brought about through his conduct of a trial, his entry of an award of damages, his imposition of receiverships and constructive trusts, and his rendering of a judgment n.o.v. — in short, through his exercise in this case

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[18] This proposition, the Court observed, was a "departure from the substantially unanimous view which has prevailed from the beginning." 227 U.S. at 284.

[19] The court below sidestepped the authority issue by taking the "random *and* unauthorized" conduct standard of *Parratt/Hudson* and watering it down to a "random *or* unauthorized" test (A63), thereby overtaxing the language and making the individual words of this Court's shorthand phrase do far more analytical work than this Court could ever have intended.

[20] One would hope that the arbitrary and abusive exercise of government power has *never* been "official policy" in this nation. But that surely cannot be a prerequisite for finding a violation of the Constitution: "history reflects the traditional and common-sense notion that the Due Process Clause, like its forebear in the Magna Carta, was 'intended to secure the individual from the arbitrary exercise of the powers of government.' " *Daniels* v. *Williams*, 106 S.Ct. at 665. And this Court has long recognized that it is "more normally to be contemplated that state powers might be abused by those who possess[ ] them", than that "States acting in their governmental capacity in a complete sense may do acts which conflict with [the Fourteenth Amendment's] provisions." *Home Telephone*, 227 U.S. at 288.

of the judicial authority with which the State of Texas clothed him.[21] The Fifth Circuit itself answered this question in the affirmative — and thereby foreclosed the inconsistent holding below — when it held Judge Walker to be absolutely immune from damages liability under § 1983 for the specific conduct at issue in this case.[22] For under *Dennis* v. *Sparks*, a judge's "immunity is dependent upon the challenged conduct being an official judicial act within his statutory jurisdiction." 449 U.S. at 29.

Although, on a first reading, the opinion below is as perplexing as it is maddening, little further reflection is needed to discover the place at which the Fifth Circuit's reasoning jumped the rails: the court simply began its analysis at the wrong starting point. Viewing *Parratt* as the background law, the court could see only *Parratt*, *Hudson* and the *Logan* v. *Zimmerman Brush Co.*, 455 U.S. 422 (1982), exception to *Parratt* and *Hudson*.[23] The opinion below proceeds as though there had been no Civil War, no Civil Rights Act, and no line of landmark decisions from *Ex parte Virginia* to *Monroe* v. *Pape*,

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[21] In *Wolff* v. *McDonnell*, 418 U.S. 539 (1974), "the relevant action of the prison officials . . . [was] their deliberate decision to deprive the inmate of good-time credit, not their hypothetically negligent failure to accord him the procedural protections of the Due Process Clause." *Daniels* v. *Williams*, 106 S.Ct. at 666. Likewise, the relevant action in this case is Judge Walker's deliberate decision to deprive Petitioners of their property by a combination of receivership orders, constructive trusts, and damage awards — judicial acts undeniably authorized by the state — not his alleged failure, in furtherance of a conspiracy with the Respondents, to provide Petitioners due process.

[22] "All of the harms Judge Walker is claimed to have caused are alleged to have been perpetrated by him through judicial acts not performed in the clear absence of all jurisdiction; accordingly, Judge Walker's immunity bars a damages claim against him for these harms." (A53).

[23] The *Logan* exception states that "postdeprivation remedies do not satisfy due process where a deprivation of property is caused by conduct pursuant to established state procedure, rather than random and unauthorized action." *Hudson*, 468 U.S. at 532.

365 U.S. 167 (1961). This is not merely a case of being unable to see the forest for the trees, but of overlooking an entire century of stately growth by concentrating solely on the most recent saplings.

The Fifth Circuit found that this case did not fit into the *Logan* exception. In fairness to the court below, the point is debatable.[24] But *Parratt* is *not* the background law. It is a narrow exception to the fundamental rule enunciated in *Home Telephone* that, "although the act of the [state officer] was wrongful from the point of view of the state constitution or law, it was nevertheless an act of a state officer within the intendment of the Fourteenth Amendment," 227 U.S. at 292, even though the State's remedial procedures may stand ready to provide redress.

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[24] If limited to its facts, *Logan* may indeed be applicable only to deprivations wrought by "the terms of [a state] statute." *Hudson* 468 U.S. at 532 n.13. But at least one circuit, in square conflict with the Fifth, has read *Logan* more generously, to include a "challenge to a direct abuse of the state process itself." *See Bretz* v. *Kelman*, 773 F.2d 1026, 1031 (9th Cir. 1985). And *Logan* itself summarized the issue presented by its facts as whether due process is denied when "a state official, for reasons beyond the complainant's control, failed to comply with a statutorily mandated procedure." 455 U.S. at 424. That language seems to fit the situation here — where Juge Walker, because of the conspiracy that was obviously beyond Petitioner's control, failed to provide the fair trial mandated by Texas law. Moreover, to use the Court's language in *Hudson*, the deprivation in the case at hand was undeniably "caused by conduct pursuant to established state procedure" — a trial and ensuing judicial decrees — "rather than random and unauthorized action." 468 U.S. at 532. After all, Judge Walker is not alleged to have crept into Petitioner Holloway's home and absconded with his stock certificates — surely "unauthorized action" — nor even to have to left the bench in the middle of trial to "shake down" Holloway's brief case and "destroy[ ] . . . legal materials [and] letters . . . as a means of harassment," *Hudson* v. *Palmer*, No. 82-1630, App. 7-8, but to have conspired with Respondents to effect the deprivation of Holloway's assets through abuse of his judicial office and manipulation of established trial procedures.

II. THE DECISION BELOW TRIVIALIZES THE RIGHT TO A FAIR TRIAL AND CONTRADICTS THIS COURT'S RECENT HOLDING IN *AETNA LIFE INSURANCE COMPANY V. LAVOIE*.

The Fifth Circuit's holding that federal law secures no right to a neutral adjudication as such, but only to a constitutionally adequate "procedure for choosing judges" (A11) and to a "post-deprivation remedy through the right of appeal" where an "individual judge . . . act[s] arbitrarily or corruptly" (A12), trivializes over half a century of precedent on the meaning of the fundamental right to a fair trial before an unbiased judge. *See, e.g., Ward* v. *Village of Monroeville*, 409 U.S. 57 (1972); *In re Murchison*, 349 U.S. 133 (1955); *Tumey* v. *Ohio*, 273 U.S. 510 (1927). For under the Due Process Clause, no judge "can be . . . permitted to try cases where he has an interest in the outcome." *In re Murchison*, 349 U.S. at 136. The test is whether a given situation is one "which might lead [the judge] not to hold the balance nice, clear and true" between the parties. *Tumey* v. *Ohio*, 273 U.S. at 532. A corrupted "trial court procedure [may not] be deemed constitutionally acceptable simply because the State eventually offers [an aggrieved party] an impartial adjudication. Petitioner is entitled to a neutral and detached judge in the first instance." *Ward* v. *Village of Monroeville*, 409 U.S. at 61-62.

The allegations of bribery and conspiracy in Petitioner's complaint present an even more obvious due process violation than any this Court considered in *Tumey* or its progeny. For they augur the prospect that the judge did not merely fail "to hold the balance nice, clear and true," but that he in fact dispensed with the scales of justice altogether by making his

judgment *before* the trial even began.[25] Thus, the threat to due process here is *not* that Judge Walker, being biased, might have been predisposed during trial to listen more attentively to Respondents than to Petitioner, but that he was just not listening *at all* because he had already decided to rule against Petitioner — with or without the cooperation of the jury.

The decision below cannot be reconciled with this Court's unanimous holding just last Term that the very participation of even a merely biased judge violates the Fourteenth Amendment. *Aetna Life Insurance Co.* v. *Lavoie*, 106 S.Ct. 1580 (1986). In *Aetna*, where Justice Embry of the Alabama Supreme Court participated in a decision that would have affected the prospects of two pending lawsuits to which the Justice was a party, the presumed "constitutional adequacy" (A12) of Alabama's judicial selection procedures did not deter a single member of this Court from embracing the proposition that Justice Embry's "participation in this case violated appellant's due process rights as explicated in *Tumey*, *Murchison*, and *Ward*." *Id.* at 1587. It mattered not that a further "postdeprivation remedy" was obviously available on petition for rehearing. It was plain that "[t]he violation of the Due Process Clause occurred *when Justice Embry sat on this case*," *id.* at 1591 (Blackmun, J., joined by Marshall, J., concurring in the judgment) (emphasis added); *see id.* at 1587 (Burger, C.J., for the Court); *id.* at 1590 (Brennan, J., concurring), not when the motion for rehearing was denied.[26]

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[25] Judge Walker placed Humble Exploration Co. into receivership at the beginning of the hearing that he convened on this issue — *before* Petitioner even had a chance to cross-examine the other side's *first witness*. *Humble Exploration Co., Inc.* v. *Fairway Land Co.*, 641 S.W.2d 934, 936 (Texas Civ. App. — Dallas 1982).

[26] Thus the fact that Justice Embry was sitting on the state court of last resort cannot serve to distinguish his situation from that of Judge Walker. Even in the first instance, "Justice Embry's participation in th[e] case violated appellant's due process rights". 106 S.Ct. at 1587. It would be more than a little weird

There are, to be sure, certain rights secured by the Constitution whose violation cannot be said to have occurred, in a completed sense, unless and until the state "refuses to provide a suitable postdeprivation remedy." *Hudson*, 468 U.S. at 533. Such rights include, for example, the right not to be deprived of private property for public use without just compensation,[27] and the right — when the requirement of a predeprivation hearing is obviated by impossibility,[28] impracticability,[29] or exigent circumstances[30] — not to be deprived of property without a suitable postdeprivation hearing. But nothing in the decisions of this Court remotely supports the view that *all* procedural rights are of this character. Surely the elemental right to a fair trial before an impartial judge — the right at issue in this case — is a right whose violation is complete when an

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if the *Aetna* holding applied only to a state's highest court, because of the availability of state appeal from the decisions of biased or conspiring judges in lower state courts. Indeed, the Fifth Circuit offers no reason why its insistence on inquiring whether "a *state system as a whole* provides due process of law" (A65) (emphasis added) should be arbitrarily limited to the judicial branch of state government. So long as the legislature remains open to receive individual pleas for justice, much as Congress considers private bills or as the House of Commons considers private acts to overturn final judicial decrees of the House of Lords, the logic of the court below would require a conclusion that the Constitution had not been offended, no matter how egregious the bias or corruption in the state's courts. *Cf. Calder* v. *Bull*, 3 U.S. (3 Dall.) 386 (1798) (upholding over challenge as an *ex post facto* law a state legislature's resolution that (1) set aside a probate court decree that had failed to approve a will and (2) granted a new hearing — at which the will was approved — after the ordinary right of appeal had expired).

[27] *See, e.g., Hudson* v. *Palmer*, 468 U.S. at 539 (O'Connor, J., concurring) (no unconstitutional taking results if just compensation is provided). *Cf. Barney* v. *New York*, 193 U.S. 430 (1904) (dismissing federal suit seeking to enjoin city's railroad construction as deprivation of property).

[28] *See, e.g., Parratt* v. *Taylor*.

[29] *See, e.g., Ingraham* v. *Wright, supra*.

[30] *See, e.g., North American Cold Storage* v. *Chicago, supra*.

unfair trial has been held and a corrupt judgment has been entered as a result. The right to a fair trial, after all, is a right to a fair *trial* — not merely a right to fairness in the state's process of judicial review at some point before this Court is asked to grant certiorari.

Were the law otherwise, it would follow that a litigant seeking a reversal of a trial court verdict in a state appellate tribunal would be limited to invoking state grounds for relief, and could never argue that the Constitution's due process guarantee had been violated by the way the trial was conducted — since no state denial of due process could be deemed complete and ripe until the conclusion of all state appeals. Yet nothing short of so bizarre a conclusion follows from the Fifth Circuit's holding that the right to a fair trial has no substantive content, but merely triggers a procedural requirement of post-trial correction by a state appellate court.[31]

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[31] Even if federal law should be construed to provide no remedy against those private persons who injure others by conspiring with trial judges in circumstances where state appellate review is fully available to undo the resulting harm, that principle should have no application where, as here, access to the state's appellate system has been denied on the basis of the injured party's defensive assertion, in a federal forum, of a collateral attack on the state trial adjudication. *See* n.12 *supra*.

Petitioner does not here seek certiorari on the separate ground that such forfeiture, based on a defensive pleading in a federal suit, renders the state's corrective system constitutionally insufficient. He does, however, urge that, even if the Fifth Circuit's broad reading of *Parratt* and *Hudson* were otherwise correct, those decisions do not warrant dismissal of a § 1983 claim where, as here, the state appellate remedy was not meaningfully available. Indeed, it would be little short of bizarre to view this case as a suitable occasion for *Parratt* and *Hudson* to be interpreted — for the first time — as the Fifth Circuit read them. Those cases, after all, explicitly require a *meaningful* postdeprivation remedy. Nor is this an appropriate case in which to pioneer even a limited exhaustion requirement for § 1983 actions, since Petitioner pursued — and was turned away from — the only appellate remedies offered by Texas.

The fact that the constitutional violation alleged in the complaint is already complete therefore takes this case completely outside the ambit of *Parratt* and *Hudson*.[32]

III. THE FIFTH CIRCUIT'S RADICAL EXPANSION OF THE *PARRATT/HUDSON* EXCEPTION CONFLICTS WITH THE HOLDINGS OF OTHER CIRCUITS.

In denying Holloway's petition for rehearing, the Fifth Circuit specifically addressed "authority from several circuits conflicting with the decision[ ] rendered by this court in the present case" (A60), but expressly declined to follow those authorities.

In *Patterson* v. *Coughlin*, 761 F.2d 886 (2d Cir. 1985), *cert. denied*, 106 S.Ct. 879 (1986), a prisoner brought suit after being sentenced to isolation and deprived of good-time credit in violation of state law and without being afforded a hearing conforming to the due process standards set out in *Wolff* v. *McDonnell*, 418 U.S. 539 (1974). The Second Circuit began its analysis by observing that "[i]t has long been settled that unconstitutional conduct that *also* violates state law is still actionable under § 1983," 761 F.2d at 891 (original emphasis),

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[32] The only other way to read the Fifth Circuit opinion is that there *is* a complete due process violation, but that the state should have a chance to cure it before a federal court gets involved pursuant to a claim under § 1983. Such a holding, of course, could not be reconciled with this Court's decisions in *Monroe* v. *Pape*, *supra*, and *Patsy* v. *Florida Bd. of Regents*, 457 U.S. 496 (1982), that § 1983 does not require the exhaustion of state judicial or administrative remedies. And if this is what the court below in fact held, then its decision is in direct conflict with *Patterson* v. *Coughlin*, 761 F.2d 886, 893 (2d Cir. 1985) ("Once a cause of action for a constitutional violation accrues, nothing the state does subsequently can cut off the § 1983 claim"), *cert. denied*, 106 S.Ct. 879 (1986).

and that "[a]llegations of procedural due process violations by certain individual government employees, as opposed to direct challenges to state procedures or the lack thereof, have long been accepted as constituting state action and forming the basis for a claim under the civil rights statutes." *Id.* The prisoner's claim certainly fell within this category, and the *Parratt/Hudson* exception did not dictate a different conclusion: "although the denial of due process may have been 'unauthorized' " — since the prison officials violated state law as well as the *Wolff* standards — "the deprivation of liberty at issue here does *not* appear to have been 'unauthorized' as that term is meant by *Parratt*." *Id.* at 892 (original emphasis). The *deprivation* was pursuant to an established state prison disciplinary procedure, and the Second Circuit held that the *Parratt/Hudson* exception simply had no bearing on a § 1983 claim that state officials conducted a hearing that *itself* violated standards of due process. "*Parratt* did not alter the fundamental tenets of due process." *Id.*

The court below flatly rejected the Second Circuit's analysis, insisting that "[i]f laws and regulations providing due process exist in theory," no constitutional violation occurs "merely because the official who randomly deprives [someone] of liberty or property without the hearing required by state law has the power to grant such a hearing." (A63-64). Thus, contrary to the rule of *Hudson* v. *Palmer* that the question is whether the "*deprivation of property* is caused by conduct pursuant to an established state procedure," 468 U.S. at 532 (emphasis added), the Fifth Circuit instead inquired whether the *denial of due process* was part of the "ordinary practice" of "the state system." (A63). The court below reasoned that, since Texas has "rules against judicial bias and conspiracy . . . it is clear that any violation of these rules by a Texas judge would be a random act." (A64). According to the Fifth Circuit, a § 1983 complaint can escape summary dismissal only if it alleges that

state "laws and regulations providing due process" are "systematically ignored." (A63).

The court below likewise "decline[d] to follow the view of the Ninth Circuit." (A61). Sitting *en banc* in order to resolve "the doctrinal ambiguity which exists in this circuit over the application of *Parratt* v. *Taylor*," the Ninth Circuit considered a § 1983 complaint alleging a conspiracy among police, prosecutors and others to bring fraudulent burglary charges against the plaintiff, and to harass him by means of false testimony, perjury and prosecutorial misconduct. *Bretz* v. *Kelman*, 773 F.2d 1026, 1027 (9th Cir. 1985). As a result of the false charges, of which plaintiff Bretz was acquitted, he was denied bail on an unrelated charge. In a unanimous *en banc* decision, the Ninth Circuit held that the "*Parratt* analysis, in which the touchstone for predeprivation process is the feasibility of providing such process, is simply inapplicable where the alleged deprivation is inextricable from the alleged corruption of the process which the state ordinarily could provide." 773 F.2d at 1031.[33] Therefore, "[i]t is meaningless to speak of the state's ability to provide postdeprivation remedial process where the state process itself has been abused." *Id.*[34] Despite *Parratt* and *Hudson*, an abuse of power by a state official resulting in harm

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[33] The Ninth Circuit read *Parratt* and *Hudson* as applying only to situations where "it is impracticable or impossible for the state to provide predeprivation process because the governmental machinery cannot foresee or predict random unauthorized actions." 773 F.2d at 1030. In such cases, the state "must be given an opportunity to redress a minor deprivation before a constitutional violation can have occurred" at all. *Id.* at 1031.

[34] The *Bretz* court saw the "challenge to a direct abuse of the state process itself" as falling within the *Logan* exception. 773 F.2d at 1031. Whatever the merits of that particular view, *see* n.24 *supra*, the Ninth Circuit in any event found that conspiratorial abuse of state authority can provide a basis for a sound claim under § 1983. Petitioner need not rely on the Ninth Circuit's broad reading of *Logan*, which is also in conflict with the reading of the Fifth Circuit (*see* A61-62), in order to find *Bretz* in conflict with the Fifth Circuit's application of *Parratt* and *Hudson*.

through the corruption of state judicial procedures is still a violation of the Fourteenth Amendment and therefore, according to the unanimous Ninth Circuit in *Bretz*, is cognizable under § 1983. Curiously, the court below found this reasoning "unpersuasive." (A61).

Unlike circuit conflicts involving interpretation of relatively recent statutes or the resolution of relatively marginal issues, this conflict goes to the very heart of the federal system as envisioned by the Fourteenth Amendment and as implemented by Congress in the wake of the Civil War. No such conflict should be permitted to persist while this Court sits.

In any event *this* Court, rather than the Fifth Circuit, is the appropriate forum to determine whether the *Parratt* and *Hudson* cases relegated the unanimous decision in *Dennis* v. *Sparks* to the status of an academic curiosity, and whether those cases are to be read as largely supplanting the corpus of Fourteenth Amendment doctrine that this Court has nurtured for over a century. If a negative answer seems as clear to the Court as it does to Petitioner, reversal *per curiam*, without further ado, is in order. Otherwise, this case should be scheduled for plenary briefing and argument.

Respectfully submitted,

LAURENCE H. TRIBE
Counsel of Record
BRIAN KOUKOUTCHOS
1525 Massachusetts Avenue
Cambridge, Massachusetts 02138
(617) 495-1767

August 21, 1986

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PAT S. HOLLOWAY,
Plaintiff-Appellant,

No. 85-1289

v.

OPINION

JUDGE DEE BROWN WALKER, et al.,
Defendants-Appellees.

Filed March 19, 1986

Before: Charles Clark, Chief Judge, Henry A. Politz, and Jerre S. Williams, Circuit Judges.

Appeal from the United States District Court
for the Northern District of Texas
Barefoot Sanders, District Judge, Presiding

CHARLES CLARK, Chief Judge:

On November 18, 1982, Pat S. Holloway, Humble Exploration Company, Inc., and Sterling Pipeline Company (hereinafter Humble and Holloway" or "plaintiffs") brought this action pursuant to 42 U.S.C. § 1983 against Judge Dee Brown Walker, the Brownings (Jane H. Browning, Katherine Louise Browning Cook, Averille Adams Browning, William Webb Browning, III, Winifred Fallon Browning, Robert Holland Browning, and others), G.H. Kelsoe, Jr. and R. Jack Ayres, Jr. (attorneys for the Brownings) and John Wright, Jr., who had served as a receiver appointed by Judge Walker (hereinafter

collectively "defendants"). Holloway and Humble alleged that the appellees had conspired to control the outcome of a state court lawsuit over which Judge Walker presided and thereby deprive plaintiffs of their property without due process of law. The plaintiffs also asserted pendent state law claims. The district court held that the acts alleged by plaintiffs did not violate the due process clause of the Fourteenth Amendment and dismissed the § 1983 action and the pendent state claims. We affirm.

I. FACTS

The facts pertinent to this case were recited in an earlier opinion of this court, *Holloway v. Walker*, 765 F.2d 517, 519-21, *reh'g en banc denied*, 773 F.2d 1256 (5th Cir.), *cert. denied*, ____ U.S. ____, 106 S.Ct. 605, 88 L.Ed.2d 583 (1985), and we add only the material in brackets:

> The complicated history of this case begins on September 12, 1979 when the Brownings . . . filed suit against Humble, Holloway and others in the 193rd Judicial District Court of Dallas County, Texas, seeking, as the alleged equitable owners of substantially all of the assets of Humble and Holloway, the imposition of the constructive trust on Humble's and Holloway's assets, actual and exemplary damages, and the appointment of an interim receiver to manage the disputed assets. Sterling Pipeline Company was later added to the case. (The lawsuit is hereinafter referred to as the "1979 case"). On November 19, 1979, Humble and Holloway filed Chapter 11 voluntary bankruptcy petition and removed the 1979 case to the United States Bankruptcy Court for the Northern District of Texas, pursuant to 28 U.S.C. § 1478(a).

The parties entered a "Stipulation and Agreement on Manner in Which Controversy Shall Be Heard, Determined and Liquidated," which was approved by the bankruptcy court and annexed to the court's January 18, 1980 "Order Remanding Causes of Action and Modifying Automatic Stay." The remand order remanded the 1979 case to the 193rd Judicial District Court pursuant to the terms of the stipulation and agreement, and modified the automatic stay to permit trial of the case upon remand, subject to the terms of the stipulation and agreement. The stipulation and agreement provided, among other things, that upon remand of the case the parties would request the presiding judge of the administrative judicial district to assign a visiting or retired state judge to hear the consolidated cases.

The case was remanded and the presiding judge assigned it to a retired state judge who ordered enforcement of a prior settlement agreement. In 1981, the Court of Appeals for the Fifth Supreme Judicial District of Texas (the "Texas court of appeals") reversed the order enforcing the settlement agreement and remanded the case for a jury trial. The Texas Supreme Court found no reversible error. Upon remand from the state appellate courts, the 1979 case was assigned to a different retired state judge who entered an order nullifying the prior settlement agreement.

On May 26, 1982, a group of investors sued Holloway and Humble in the 162nd Judicial District Court of Dallas County, Texas, Judge Dee Brown Walker presiding, claiming that Humble had wrongfully shut-in over 150 oil and gas wells jointly owned by the investors and Humble. This suit is alleged by

Holloway to have been brought pursuant to the conspiracy, solely for the purpose of creating a case before Walker into which the 1979 action could be consolidated, in violation of the agreement that restricted the judge who could hear the 1979 action to one who had retired or was visiting the judicial district. The investors sought the appointment of a receiver over Humble's assets. (The case is hereinafter referred to as the "1982 case"). The Brownings were named as defendants in the 1982 case because of their claim to ownership of Humble's and Holloway's assets. The 1982 case was removed to the bankruptcy court and remanded to Judge Walker's court on the same day.

On May 28, 1982, Judge Walker appointed a receiver in the 1982 case over Humble's and Holloway's assets. Thereafter "ensued a somewhat dizzying sequence of state court orders," most of which were issued by Judge Walker, and recounted in *Browning v. Navarro*, 37 B.R. 201, 205-06 (D.C. N.D. Tex. 1983), which resulted in the transfer and consolidation of the 1979 case into the 1982 case before Judge Walker in the 162nd Judicial District Court. On June 24, 1982, the May 28, 1982 receivership order having been vacated by the state court of appeals, Judge Walker granted the Brownings' request for a separate and expedited trial of the 1979 case. On August 26, 1982, after month-long trial, judgment was entered in the 1979 case for the Brownings, imposing a constructive trust on Humble's and Holloway's assets and awarding the Brownings actual damages of $72,000,000 and exemplary damages of $10,000,000.

On November 18, 1982, Humble and Holloway brought the action in which the present appeal is taken [the "§ 1983 action" or the "civil rights case"] against Judge Walker, the Brownings, legal counsel for the Brownings and many others, alleging that all the defendants had conspired to violate Humble's and Holloway's civil rights in the 1979 case. The complaint alleges that Walker and the other defendants conspired to seize control of Humble through the abuse of Walker's judicial office. Holloway contends that pursuant to the conspiracy Walker arranged to have the 1982 case brought before his court contrary to the usual procedure for assigning cases, that Walker thereafter arranged to have the 1979 and the 1982 cases consolidated in his court, that he imposed receiverships on Humble's and Holloway's assets, defied a mandamus order of the Texas Court of Appeals to refrain from interfering in Humble's business, appointed an incompetent receiver for Humble, dismissed many Humble personnel, posted guards at Humble's headquarters to seize the building, and, in a hotel near the courthouse, conducted meetings regarding Humble's business, all in furtherance of the conspiracy. Holloway contends extensive damage was done to him and Humble through Walker's pernicious actions. . . .

Holloway's complaint requests damages as well as equitable and declaratory relief under section 1983. In addition, Holloway requests similar relief under Texas state law. [Judge Walker moved to dismiss the civil rights claim against him based on the doctrine of judicial immunity. The district court denied his motion and Judge Walker appealed. This court held that Walker was entitled to the benefit of

judicial immunity and dismissed all damage and state law claims against him. *Holloway v. Walker, supra.* 765 F.2d at 526. Therefore, only the equitable and declaratory claims remain as to Walker].

After Humble and Holloway filed the civil rights case they perfected an appeal from the judgment in the 1979 case to the Texas court of appeals. The Texas court of appeals was the appropriate Texas appellate court to hear the appeal of a case from Judge Walker's court. However, neither Humble nor Holloway posted a supersedeas bond to stay execution of the judgment in the 1979 case pending their appeal.

The Brownings then brought an action in the United States District Court (the "turnover action") to obtain possession of Humble's and Holloway's assets which, according to the judgment in the 1979 case, were being held for their benefit. Humble, Holloway and their trustee, Dan Navarro, refused to turn the assets over to the Brownings. They argued that the proceedings before Judge Walker, an active judge, were void because the 1979 case was tried in contravention of the bankruptcy court's original remand order. The United States District Court granted a summary judgment in favor of Navarro and held that the trial of the 1979 case before Judge Walker was void. This court, however, reversed the district court's determinations and held that the trial before Judge Walker was not void because the remand order had been satisfied. *Browning v. Navarro,* 743 F.2d 1069 (5th Cir. 1984).

The appeal of the 1979 case was pending in the Texas court of appeals while the turnover action was being litigated in the United States District Court.

The Texas court of appeals, however, believed that the turnover action constituted a collateral attack on Judge Walker's judgment in the 1979 case. Therefore, the Texas court of appeals dismissed Humble's and Holloway's appeal because it did not believe Humble and Holloway were entitled to two appeals from the judgment in the 1979 case. [After the reversal of the district court's decision in the turnover action, the Texas court vacated its prior order of dismissal. However, the appellate court, sitting *en banc*, later reinstated the order of dismissal. *Humble Exploration Co. v. Browning*, 690 S.W.2d 321 (Tex. Ct. App. 1985) (en banc), *reinstating* 677 S.W.2d 111 (1984). With the Texas Supreme Court's denial of Humble's and Holloway's application for writ of error, it appears that appellees have no further recourse in the state courts].

[The various defendants in the civil rights case moved for summary judgment. On March 11, 1985, the district court granted summary judgment for defendants with respect to Humble's and Holloway's claims of deprivation of procedural due process. The court relied on *Parratt v. Taylor*, 451 U.S. 527, 101 S.Ct. 1908, 68 L.Ed.2d 420 (1981) and *Hudson v. Palmer*, ____ U.S. ____, 104 S.Ct. 3194, 82 L.Ed.2d 393 (1984). However, the district court denied summary judgment for defendants with respect to the claims of deprivation of substantive due process. The court concluded that the right to a fair trial was a substantive due process right and therefore did not fall within *Parratt/Hudson*. It also found that a genuine issue of material fact existed as to whether defendants had violated this right through a conspiracy with Walker. However, on March 28, 1985, the

district court found that with respect to certain of the defendants, the "Browning Interests," there was no genuine issue of material fact that the Browning interests defendants participated in the alleged conspiracy and therefore granted summary judgment for these defendants on all the federal claims. Finally, on April 18, 1985, the court reversed its earlier ruling on the substantive due process issue. It concluded that the alleged conspiracy would violate no substantive due process right. The court granted summary judgment for all defendants,, dismissing plaintiffs' § 1983 claims with prejudice. Humble and Holloway appeal from all three adverse rulings of the district court].

II. *PARRATT/HUDSON*

The principal issue presented in this appeal is whether the § 1983 claim advanced by plaintiffs Humble and Holloway, i.e., that they were deprived of a fair trial by virtue of a conspiracy between Judge Walker and the opposing litigants, is barred by the Supreme Court's holdings in *Parratt v. Taylor* and *Hudson v. Palmer, supra*. In *Parratt* a Nebraska state prisoner brought a § 1983 action to recover the value of a hobby kit negligently lost by a prison employee. He claimed that he had been deprived of his property "without due process of law." The Supreme Court rejected this claim. *Parratt*, 451 U.S. at 543 101 S.Ct. at 1917. The Court reasoned that it was not practicable for the state to provide a hearing *before* a random and unauthorized deprivation of property by a state employee, since the state could not tell when such deprivations might occur. Thus, postdeprivation tort remedy provided by

the state constituted all the process that was due.[1] *Id.* at 541-44, 101 S.Ct. at 1916-17. The Court emphasized that there was no allegation that the deprivation of property resulted from constitutionally inadequate state procedures. *Id.* at 543, 101 S.Ct. at 1917. Finally, the Court noted that to hold that "the conduct of the state officials in this case constituted a violation of the Fourteenth Amendment would almost necessarily result in turning every alleged injury which may have been inflicted by a state official acting under 'color of law' into a violation of the Fourteenth Amendment cognizable under § 1983." *Id.* at 544, 101 S.Ct. at 1917; *see also id.* at 544, 101 S.Ct. at 1922 n.13 (Powell, J., concurring in the result) ("[i]t is not in the interest of claimants or of society for disputes of this kind to be resolved by litigation that may take years, particularly in an overburdened federal system that never was designed to be utilized in this way").

In *Hudson*, the *Parratt* rule was extended to a situation where the alleged deprivation of property was intentional rather than negligent. Reasoning that unauthorized intentional wrongs were no more predictable, and perhaps less so, than negligent behavior, the Court held that due process was not violated when a prison employee allegedly seized noncontraband property from a prisoner's cell during a "shakedown" search. *Hudson, supra*, U.S. at ____. 104 S.Ct. at 3203-05. The Court noted that the prisoner could obtain adequate compensation for his loss through state law tort remedies. *Id.* at ____, 104 S.Ct. at 3204.

The district court in the present case held that the *Parratt/Hudson* rule barred the plaintiffs' action because the alleged conspiracy by the state court judge to deprive plaintiffs of their

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[1] In *Daniels v. Williams*, ____ U.S. ____, 106 S.Ct. 662, 663, 88 L.Ed.2d (1986), the Court concluded that "the Due Process Clause is simply not implicated by a *negligent* act of an official causing unintended loss of or injury to life, liberty or property."

property constituted a random and unauthorized act by a state employee. The opportunity to appeal from the judgment was an adequate postdeprivation remedy; thus plaintiffs, though deprived of their property, were not deprived of due process.

Plaintiffs, however, seek to distinguish *Parratt/Hudson* on two grounds. First, they argue that, unlike the situation in *Parratt* and *Hudson*, the deprivation in this case was pursuant to an established state procedure, rather than simply the result of a random and unauthorized act. Secondly, they contend that the actions of defendants deprived them not only of a procedural due process right, as was the case in *Parratt* and *Hudson*, but also of a substantive due process right to a fair trial. We discuss these contentions separately.

A. *Established State Procedure*

[1] Relying on *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 435-36, 102 S.Ct. 1148, 1158, 71 L.Ed.2d 265 (1982), plaintiffs argue that the *Parratt/Hudson* rule does not apply where a plaintiff is deprived of property pursuant to an established state procedure. In *Logan*, the plaintiff brought a discrimination complaint before the Illinois Fair Employment Practices Commission within the period provided for by statute. The Commission was required by state statute to act on the complaint within 120 days, but it inadvertently failed to do so. The Illinois Supreme Court held that the Commission's failure to act within the statutory period deprived it of jurisdiction to hear the complaint at all. *Id.* at 426-28, 102 S.Ct. at 1152-53. Thus, Logan's cause of action was extinguished solely due to the inaction of the Commission over which Logan had no control. In holding that Logan had been deprived of his cause of action without due process, the Court distinguished *Parratt*:

> In *Parratt*, the Court emphasized that it was dealing with "a tortious loss of . . . property as a result of a random and unauthorized act by a state employee . . . not a result of some established state procedure." Here, in contrast, it is the state system itself that destroys a complainant's property interest, by operation of law, whenever the Commission fails to convene a timely conference — whether the Commission's action is taken through negligence, maliciousness, or otherwise. *Parratt* was not designed to reach such a situation. Unlike the complaint in *Parratt*, Logan is challenging not the Commission's error, but the "established state procedure" that destroys his entitlement without according him proper procedural safeguards.

Id. at 435-36, 102 S.Ct. at 1158 (citations omitted).

[2] Plaintiffs argue that because their property was taken through a judicial proceeding, which obviously is an established state procedure, the *Logan* exception to *Parratt* applies. However, plaintiffs do not challenge the validity of the established procedure, as did the plaintiff in *Logan*, but the alleged illegal and unauthorized acts of Judge Walker. While in *Logan* it was possible for the state to remedy the defective procedure so as to prevent the challenged deprivation of property, in the case at bar there is no practical way for Texas to prevent a biased or corrupt judge from depriving a litigant of property in the first instance.

[3] Of course, it is possible for a procedure for choosing judges to be constitutionally inadequate because it makes bias or corruption likely. For example, in *Ward v. Village of Monroeville*, 409 U.S. 57, 60, 93 S.Ct. 80, 83, 34 L.Ed.2d 267 (1972), the Court held that a statute authorizing mayors to act

as judges in cases involving certain ordinance and traffic infractions violated due process because the fines collected in those cases made up a substantial portion of the village income and "the mayor's executive responsibilities for village finances may make him partisan to maintain the high level of contribution from the mayor's court." It is not contended here that Texas procedure is inadequate in this respect. Indeed, plaintiffs do not seriously challenge the constitutional adequacy of any part of the Texas judicial system. Plaintiffs do contend that "the Texas system can be abused so as to permit the arbitrary and capricious conduct of one of its judicial officials, through the rendition of a final judgment, to destroy the due process and property rights of a person appearing before him." However, no judicial system offers any guarantee, other than the postdeprivation right of appeal, that an individual judge will not act arbitrarily or corruptly.

[4] The Texas court system provided an adequate postdeprivation remedy through the right of appeal to restore any wrongfully taken property to its owner. In the absence of any challenge to the established judicial procedure of Texas or allegation that Judge Walker's conspiratorial acts "represented official policy," *see Augustine v. Doe*, 740 F.2d 322, 328-29 (5th Cir. 1984), the *Logan* exception is inapplicable to this case.

Furthermore, plaintiffs' argument is clearly foreclosed by *Collins v. King*, 743 F.2d 248 (5th Cir. 1984), in which this court held that a prisoner's complaint that a member of a disciplinary tribunal was biased against him did not state a due process claim. The court applied the *Parratt/Hudson* rule, noting that "Collins does not assert that it was part of state procedure to constitute tribunals such as his in such a manner." *Id.* at 254. Similarly, in the present case plaintiffs' complaint of a random instance of a biased tribunal does not state a procedural due process claim under *Parratt/Hudson*.

Plaintiffs rely on *Shelton v. City of College Station*, 754 F.2d 1251 (5th Cir. 1985), *vacated and rev'd on other grounds*, No. 83-2765, slip op. (5th Cir. Jan. 6, 1986) (en banc), in which the court stated that "the principle established by *Parratt* does not apply when the plaintiff's claim is based either upon deprivation of a liberty interest or (as here) upon the intentional deprivation of a property interest 'pursuant to established state procedure.'" *Id.* at 1257 (citing *McCrae v. Hankins*, 720 F.2d 863, 870 (5th Cir. 1983).[2] This statement is not infringed by our holding here. Indeed, it emphasizes what we stress, namely, that the due process challenge must be the established state procedure itself and not to a random and unauthorized act of a state employee. At any rate, the quoted language from *Shelton* come within a discussion of a claim of denial of substantive due process, not procedural due process, and thus is of dubious relevance to the issue presented here. *See infra* (discussion of plaintiffs' substantive due process claim).

[5] Finally, we reject plaintiffs' argument that because the operation of Texas procedural rules has deprived them of their right of appeal in state court that they do not have an adequate postdeprivation remedy within the meaning of *Parratt/Hudson*. Nothing in *Parratt* or *Hudson* suggests that a postdeprivation remedy is inadequate merely because it is possible for a litigant to forfeit the remedy by virtue of the operation of reasonable state procedural rules. Plaintiffs do not challenge the constitutionality of the procedural rules themselves.

For the foregoing reasons defendants were entitled to summary judgment on the procedural due process claim.

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[2] Obviously, *McCrae*, which held that *Parratt* did not apply to intentional deprivations of property interests, was overruled by the Supreme Court's decision in *Hudson*.

B. *Substance or Procedure*

[6] In *Augustine, supra,* 740 F.2d at 327, we held that *Parratt* applies only asserted violations of procedural due process, not of substantive due process. Emphasizing this holding, plaintiffs argue that the "right to a fair trial" is a substantive due process right and that therefore *Parratt/Hudson* is inapplicable. They argue that a fair trial is "implicit in the concept of ordered liberty," *see Palko v. Connecticut,* 302 U.S. 319, 325, 58 S.Ct. 149, 152, 82 L.Ed.2d 188 (1937), and that a judicial conspiracy to deprive litigants of their property "shocks the conscience," *see Rochin v. California,* 342 U.S. 165, 172, 72 S.Ct. 205, 209, 96 L.Ed.2d 183 (1952).

[7] Assuming for the sake of this analysis that plaintiffs established a judicial conspiracy, the resultant shocked conscience cannot displace common sense. That sense dictates that the right to an impartial judge is a matter of procedural, not substantive, due process. *See e.g., Marshall v. Jerrico, Inc.,* 446 U.S. 238, 242, 100 S.Ct. 1610, 1613, 64 L.Ed.2d 182 (1980) ("requirement of neutrality in adjudicative proceedings safeguards the . . . concerns of procedural due process"). To hold otherwise would be to fictionalize solely for the purpose of avoiding application of *Parratt/Hudson* a situation to which *Parratt/Hudson* was clearly meant to apply, i.e., where a plaintiff is deprived of his property by the unexpected, unauthorized act of a state employee. As the district court noted, the effect of accepting plaintiffs' argument would be to hold that although a person fails to state a due process claim by complaining that he was deprived of property without due process (under *Parratt/Hudson*), he nonetheless states a due process claim by complaining he was not provided due process while being deprived of his property. We cannot undermine *Parratt/Hudson* in this way.

Plaintiffs rely principally on *Ward, supra* at note 1, to substantiate their claim that a biased judge violates substantive due process. Nowhere in *Ward*, however, does the Court state that the right to an impartial tribunal is a substantive right. *Ward* held that it was a constitutional violation to allow mayors to sit as judges in cases where the fines imposed went into the village treasury and that this combination of authorized procedures could not be corrected by a litigant's later opportunity for an impartial adjudication. 409 U.S. at 61-62, 93 S.Ct. at 84. However, this holding merely illustrates the principle, discussed above in connection with procedural due process, that a deprivation pursuant to an established state procedure that is itself constitutionally defective cannot be cured by a postdeprivation remedy. It does not convert procedure into substance.

In *Collins, supra*, 743 at 250, we stated that an allegation of a biased tribunal was clearly a procedural due process complaint. In *Shelton, supra*, 754 F.2d at 1258-59, we treated an allegation of a biased fact-finder as a procedural due process complaint. Nothing in these cases suggests that the issue of the impartiality of a tribunal could be matter of substantive due process.

The allegation of a judicial conspiracy does not state a substantive due process claim. Summary judgment was properly entered for defendants on this claim.

III. PENDENT CLAIMS

Plaintiffs contend that the district court abused its discretion by dismissing the pendent state claims, including claims of negligent and wrongful receivership. However, as the district court pointed out, federal courts strive "to abstain from adjudicating the validity and propriety of the actions of the re-

ceiver appointed by a state court." No abuse of discretion by the district court has been shown. *See United Mine Workers v. Gibbs*, 383 U.S. 715, 726, 86 S.Ct. 1130, 1139, 16 L.Ed.2d 218 (1966) ("if the federal claims are dismissed before trial, even though not unsubstantial in a jurisdictional sense, the state claim should be dismissed as well").

IV. CONCLUSION

The Constitution of the United States marks the jurisdictional line for this § 1983 action. Plaintiffs level grave charges against Judge Walker and the opposing litigants. Plaintiffs' rights of state court review were lost by a unique, complex mix of events (which plaintiffs played a major part in creating). Nevertheless, these alleged acts of judicial conspiracy and lack of postdeprivation remedy do not amount to a violation of constitutional due process. The district court correctly granted summary judgment for defendants.[3] The district court's dismissal of the § 1983 claims and the pendent state claims is

AFFIRMED.
Judgment in accordance with opinion.

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[3] Our disposition of this case makes it unnecessary to reach plaintiffs' other contentions, including their argument that the district court erred in holding that the summary judgment record fails to demonstrate that the Brownings participated in the alleged conspiracy.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS DALLAS DIVISION

PAT S. HOLLOWAY, et al.	*	
	*	
Plaintiffs	*	Civil Action
v.	*	No. 3-82-1846-H
	*	
JUDGE DEE BROWN WALKER, et al.	*	
	*	Filed April 18, 1985
Defendants	*	

MEMORANDUM OPINION AND ORDER

This case is before the Court on Defendant R. Jack Ayres, Jr.'s Motion to Clarify, Motion to Reconsider and in the Alternative, Motion to Certify, filed March 21, 1985, and Plaintiffs' Response, filed April 12, 1985.

By Memorandum Opinion and Order of March 11, 1985, the Court granted Defendant Ayres' Motion for Summary Judgment as it related to Plaintiffs' procedural due process claim and denied it as it addressed a substantive due process claim for the deprivation of a constitutional right to a fair trial.

Motion to Reconsider

Defendant Ayres seeks the reconsideration of the previous order and the grant of a total summary judgment. He argues that the claim of a trial before a biased decision-maker is one of procedural, and not substantive, due process. Upon further examination, the Court agrees.

The distinction is, of course, more than purely semantic. The Court has recognized that under *Hudson* v. *Palmer*, 104 S.Ct. 3194 (1984), the presence of an adequate state appellate remedy requires the dismissal of a procedural due process claim, while a substantive due process violation is actionable regardless of the availability of a post-deprivation process. *Wolf-Lillie* v. *Sonquist*, 699 F.2d 864, 871 (7th Cir. 1983); *Brewer* v. *Blackwell*, 692 F.2d 387, 385 (5th Cir. 1982); *Madden* v. *City of Meriden*, 602 F.Supp. 1160 (D.Conn. 1985); *Ramos* v. *Gallo*, 596 F.Supp. 833, 837 (D.Mass. 1984); *Spell* v. *McDaniel*, 591 F.Supp. 1090, 1106 (E.D.N.C. 1984); *Garcia* v. *County of Los Angeles*, 588 F.Supp. 700, 704 (C.D.Cal. 1984); *Irshad* v. *Spann*, 543 F.Supp. 922, 926 (E.D.Va. 1982). To violate substantive due process, a state's conduct must be inherently impermissible, regardless of any protective or remedial procedures it provides. *Schiller* v. *Strangis*, 540 F.Supp. 605, 613 (D.Mass. 1982).

The dividing line between substantive and procedural due process is not always clear, *Madden, supra*. When in doubt, a court should analyze the adequacy of a complaint under both theories.[1] *Ramos, supra*, at 837; *Garcia, supra*, at 705.

An unbiased decision-maker is certainly an ingredient of procedural due process, as Defendant capably documents his motion. *See also Serafin* v. *City of Lexington*, 547 F.Supp. 1118 (D.Neb. 1982), *aff'd*, 716 F.2d 909 (8th Cir. 1983). That conclusion does not, however, terminate the inquiry. A single act depriving a citizen of a right may simultaneously constitute a violation of substantive constitutional rights and of the right to procedural due process. *Owen* v. *Lash*, 682

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[1] It bears noting that recent Supreme Court cases have not analyzed section 1983 claims in terms of substantive due process. These seemingly deliberate omissions may mean that substantive due process requirements are satisfied when *Parratt* criteria are satisfied. But then again it may not. *Holmes* v. *Wampler*, 546 F.Supp. 500, 504-505 (E.D.Va. 1982).

F.2d 648, 652 n.4 (7th Cir. 1982), *citing Procunier v. Martinez*, 416 U.S. 396 (1973). The Court must thus determine whether a substantive guarantee to due process has been shown by Plaintiffs to have been violated.

Substantive due process represents a difficult-to-define protection from particularly outrageous official conduct which falls under no other specific constitutional protection. *Garcia, supra*, at 705. It is recognized as a last line of defense against those literally outrageous abuses of official power whose very variety makes formulation of a more precise standard impossible *Hall v. Tawney*, 621 F.2d 607, 613 (4th Cir. 1980).

In *Rochin v. California*, 342 U.S. 165, 169 (1952), the Supreme Court held that police action in prying open the mouth of a suspect and forcing him to vomit up evidence so "shocks the conscience" as to violate due process. In the words of Justice Frankfurter, "Due process of law is a summarized constitutional guarantee of respect for those personal immunities which . . . are 'so rooted in the traditions and conscience of our people as to be ranked as fundamental,' or are 'implicit in the concept of ordered liberty'". [citations omitted].

Although this language is broad enough to support a colorful argument by Plaintiffs, *but see Engsberg v. Town of Milford*, 601 F.Supp. 1438, 1445 (W.D.Wisc. 1985), a review of the substantive due process cases reveals that consciences are only to absorb shocks in certain contexts. Specifically, substantive due process, which presumably derives solely from the fourteenth amendment, *Holmes, supra*, at 504 n.3,[2] protects the right to be free of state intrusions into realms of personal privacy and bodily security through means so brutal, demeaning, and harmful as literally to shock the conscience of a court. *Juncker v. Tinney*, 549 F.Supp. 574, 581 (D.Md. 1982), *citing*

[2] The sixth amendment does not guarantee a federal right to a fair and impartial judge, as such. *Morgan v. Neal*, 325 F.Supp. 1196, 1206 (E.D.Tenn. 1970).

Hall v. Tawney, supra. The cases imply some minimum standard of severity of violation of bodily security and freedom as a prerequisite to the conclusion that a violation of the fourteenth amendment has occurred. *Madden, supra.* Although most of the cases of conscience shock have involved physical brutality, *see Johnson v. Glick,* 481 F.2d 1028, 1033 n.6 (2d Cir. 1973), *cert. denied,* 414 U.S. 1033 (1973), the Supreme Court has often noted in the analogous context of interrogation that psychological tactics can be equally destructive of human dignity. *Morrison v. Lefevre,* 592 F.Supp. 1052, 1078 (S.D.N.Y. 1984). *See also Shillingford v. Holmes,* 634 F.2d 263, 265-66 (5th Cir. 1981) (substantive due process claim stated for policeman's unprovoked and unjustified striking of a tourist who was photographing an arrest). *See generally* M. Wells and T.A. Eaton, Substantive Due Process and the Scope of Constitutional Torts, 18 Ga.L.Rev. 201. Plaintiffs' allegations do not fit into this pattern.

There are many other indications that a biased decisionmaker is solely a matter of procedural due process. *See Leverett v. Town of Limon,* 567 F.Supp. 471, 474 (D.Colo. 1983) (discussing substantive and procedural claims, and categorizing bias allegations under latter). The only contrary hints appear in cases such as *Ward v. Village of Monroeville,* 409 U.S. 57, 60 (1972), in which the Supreme Court found due process violated by a mayor's court in a village which derived a substantial part of its income from fines and costs imposed in those proceedings. The *Ward* court rejected the suggestion that any constitutional infirmity in the proceedings could be cured by an appellate right to trial de novo. *See also Chrysler Corp. v. Texas Motor Vehicle Commission,* slip op. at 3308, 3315 (5th Cir., March 28, 1985); *Brown v. Vance,* 637 F.2d 272, 279 (5th Cir. 1981) (challenging statutory fee system for compensating justices of the peace). *See generally Layer v. Lyles,* 598 F.Supp. 95 (D.Md. 1984) and cases discussed therein (discussing many cases involved biased judges).

The rejection of the curative potential of the appellate remedy in *Ward* and *Brown* could be argued to label the right to a fair trial as substantive, by implication. The Court is of the opinion, however, that the concept espoused in *Ward* is distinguishable. A basic prerequisite to the application of the *Parratt-Hudson* analysis is that the conduct of the state actor causing the deprivation be random and unauthorized. The availability of a state remedy is irrelevant, and the right may not be infringed in the first instance, when an established state procedure causes the deprivation. *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 436 (1982); *Vail v. Bd. of Educ. of Paris Union*, 706 F.2d 1435 (7th Cir. 1983), *aff'd*, 104 S.Ct. 2144 (1984); *Kumar v. Marion Cty. Comm*, 704 F.2d 908 (6th Cir. 1983); *Holmes v. Ward*, 566 F.Supp. 863 (E.D.N.Y. 1983). In the case of the operation of established procedures, such as in *Ward* and *Brown*, it is possible for state law to provide an adequate pre-deprivation safeguard, *viz.*, modification of the faulty procedure. *See Tumey v. Ohio*, 273 U.S. 510, 532 (1927) (it is the "procedure" that creates the bias that denies due process). In the case of random, unauthorized acts, the state is powerless to remedy the possible abuses before they occur, and thus does not act unconstitutionally unless no post-deprivation remedy is available.

Sound policy also buttresses a conclusion that no substantive due process right exists beyond the procedural rights in this situation. If the lack of an impartial decision-maker does not *a priori* constitute a deprivation of procedural due process and does not automatically yield a federal constitutional claim for the improper deprivation of property, it is troubling to suggest that the same aggrieved party nevertheless possesses a separate substantive right that can be invoked to void the proceedings. Or as Defendant Ayres argues, "If a person fails to state a claim under the fourteenth amendment by claiming that he was deprived of property without due process, then he does not

state a claim under the fourteenth amendment by claiming that he was not provided due process while being deprived of his property." Motion at 7. It tortures the cognitive faculties to logically comprehend how "due process", which after all only appears once in the fourteenth amendment, can be simultaneously violated and not violated by the same acts. Needless to say, any purpose served by *Hudson* would be eviscerated by such an arrangement.

Without expressing an opinion on the merits of the allegations in this case, the availability of a substantive due process remedy will encourage a staggering volume of constitutional challenges by disgruntled civil litigants, from whom charges of bias, bad faith and other opprobrious epithets of malice are commonplace. *Raskiewicz v. Town of New Boston*, 754 F.2d 38, 44 (1st Cir. 1985). Such claims are better relegated to the normal corrective processes of the state courts.

Pendent Claims

Plaintiffs also assert several pendent claims, including allegations of negligent and wrongful receivership. The viability of many of these causes of action asserted by Plaintiffs is in serious doubt given recent actions by the state courts on Plaintiffs' appeal. In *United Mine Workers v. Gibbs*, the Supreme Court stated that "if the federal claims are dismissed before trial, even though not insubstantial in a jurisdictional sense, the state claims should be dismissed as well." 383 U.S. 715, 726 (1966). This rule has been followed often in this circuit. *See Tinker v. DeMaria Porsche-Audi, Inc.*, 632 F.2d 520 (5th Cir. 1980); *Daniels v. All Steel Equipment, Inc.*, 590 F.2d 111 (5th Cir. 1979) This general rule, however, is not absolute. The oft-times divergent goals of state and federal comity, judicial economy, convenience and fairness should be considered in exercising what is a matter of discretion. *Ingram Corp.*

v. J. Ray McDermott & Co., Inc., 698 F.2d 1295, 1319 (5th Cir. 1983).

The court is of the opinion that the viable pendent claims, if any, should be heard in the state courts. The ultimate determination of the ownership of the property underlying the claims will eventually come from the state courts. The federal courts have previously indicated a desire to abstain from adjudicating the validity and propriety of the actions of the receiver appointed by the state court. *See Humble Exploration Company, Inc. v. The Browning Interests*, Adv. No. 382-0864-G (Order of October 5, 1982). No motions addressed to the substance of the pendent claims have been filed or considered by this Court. An adequate state forum is available.

The Court finds that the pendent claims were not filed in federal court "in intentional disregard of jurisdiction", *see* Tex.Rev.Civ.Stat.Ann. art. 5539a (Vernon 1958). Article 5539a governs the refiling in state court and is liberally construed in favor of preserving Plaintiffs' claims. *Griffen v. Big Spring I.S.D.*, 706 F.2d 645, 650-51 (5th Cir. 1983), *cert. denied*, 104 S.Ct. 525 (1983).

Accordingly, the court is of the opinion that Defendant Ayres' Motion to Reconsider should be and hereby is, GRANTED; the Court's Memorandum Opinion and Order of March 11, 1985, is MODIFIED consistent with this Opinion; all Defendants' Motions for Summary Judgment are GRANTED and Plaintiffs' claims under 42 U.S.C. § 1983 are DISMISSED WITH PREJUDICE; and Plaintiffs' pendent claims are DISMISSED WITHOUT PREJUDICE to the timely refiling of same in state court.

SO ORDERED.

DATED: April 18, 1985.

/s/_____

BAREFOOT SANDERS
UNITED STATES
DISTRICT JUDGE

APPENDIX C.

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS DALLAS DIVISION

PAT S. HOLLOWAY, et al.	*	
	*	
Plaintiffs	*	Civil Action
v.	*	No. 3-82-1846-H
	*	
JUDGE DEE BROWN WALKER, et al.	*	
	*	Filed March 11, 1985
Defendants	*	

MEMORANDUM OPINION AND ORDER

This case is before the Court on Defendant R. Jack Ayres, Jr.'s Motion for Summary Judgment and to Dismiss, filed December 31, 1984; Plaintiffs' Response, filed January 20, 1985; Defendant's Reply, filed February 11, 1985; and Plaintiffs' Response, filed March 4, 1985.

Factual Background

The trial setting of this case will have come and gone if the Court attempts to narrate all of the facts, challenges to facts, negative facts and subfacts that have survived a series of battles by affidavit and deposition. The following, however, is an aerial reconnaissance of the currant deployment of the combatants.

Plaintiffs were unsuccessful litigants in a state court consolidated trial of *Jane H. Browning v. Pat S. Holloway* and *Fairway*

Land Company v. Humble Exploration Company, Inc., presided over by Defendant Walker in the 162nd District Court of Dallas County. As a result, Defendants Browning Interests were awarded damages and a constructive trust over most of the assets of Plaintiff Humble Exploration Company, Inc.[1] Plaintiffs here have appealed that state court judgment. Subsequent to the filing of this case, that appeal was dismissed on the ground that Plaintiffs (appellants) had taken inconsistent positions in their appeal and in *Browning v. Navarro*, CA-3-83-0380-H, also pending on this Court's docket. After the Fifth Circuit reversed this Court's finding that Judge Walker had no jurisdiction to try the state court case due to a violation of the bankruptcy court's remand order, *see* 743 F.2d 1069 (5th Cir. 1984), Plaintiffs have attempted to reinstate their state appeal. The success of that effort has been awaiting determination for the past few months.

In this action, brought under 42 U.S.C. § 1983 and a multitude of pendent state law claims, Plaintiffs have alleged that their opponents in the state court and their attorneys, conspired to have the case brought before Defendant Walker, who was allegedly predisposed to their effort by the provision of various legal and political services to him without charge in the past. It is further alleged that the conspiracy to rig the outcome of the trial was furthered through various *ex parte* meetings, and through the participation of Defendants Wright, Sessions and Hurt, the receiver placed in control of Humble by Defendant Walker, the receiver's attorney and accountant, respectively. This Court previously denied all of the parties' motions to dismiss.[2]

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[1] It has been suggested in papers filed in other manifestations of this litigation that Humble has been renamed as the result of an unrelated settlement with Exxon. Nevertheless, the use of the name Humble will persist here.

[2] It should be observed that the standards of pleading a case of this nature have been dramatically heightened in this Circuit since this Court's review of the complaint. *See Elliott v. Perez*, slip op. at 2246 (5th Cir. 1985).

The Procedural Due Process Claim

In ¶ 163 of Plaintiffs' First Amended Complaint, they state:

> Plaintiffs would show that the Defendants, by their foregoing acts and omissions violated 42 U.S.C. § 1983, by acting under color of state law, and thereby deprived Plaintiffs of their rights secured by the due process clause of the Fourteenth Amendment to the United States Constitution.

In clarification, Plaintiffs subsequently stated that Defendants conspired "in particular to deprive Plaintiff Holloway of his lawful use, right and title to one hundred (100%) percent ownership in and control over Humble and Sterling without due process of law. Plaintiffs' Status Report, filed April 7, 1983. Plaintiffs are thus arguing an intentional deprivation of property without due process under color of state law.

Section 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State of Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceedings for redress.

This deceptively straightforward provision has, in recent years, been placed before the judicial telescope to reveal a cratered and tortured landscape. As has recently been observed, its facial simplicity belies a variety of indeterminate facets to ponder:

> Section 1983 does not expressly provide for the type of mental state required by the tortfeasor, whether it be negligence, intentional or strict liability. It does not provide for an exhaustion-of-remedy rule in state court as a condition precedent to maintaining a § 1983 action in federal court. It does not state that if there is an adequate remedy at state law and in state court for the act committed, one is precluded from maintaining a § 1983 action in federal court. It makes no reference to immunities. It does not establish a priority between various constitutional rights, such as liberty or property under the Due Process Clause. It does not distinguish between procedural and substantive due process.

Eaton v. City of Solon, 598 F.Supp. 1505, 1509 (N.D. Ohio 1984). Nevertheless, such are the preoccupations of Civil Rights Act jurisprudence. This Court now turns to ponder one of these concerns.

Adequate State Remedy: You Can't Get Here from There

The Supreme Court has held that it is unnecessary to exhaust administrative or judicial remedies as a condition precedent to maintaining a § 1983 action. *Patsy v. Florida*, 457 U.S. 496 (1982); *Monroe v. Pape*, 365 U.S. 167 (1961). The decision in *Patsy* rested primarily on an analysis of the legislative history of Section 1 of the Civil Rights Act of 1871, 17 Stat. 13, the forerunner of Section 1983, and the Civil Rights of Institutionalized Persons Act ("CRIPA"), 42 U.S.C. § 1997. In light of the original purposes of the 1871 Act, and the timidity with which Congress added a narrow and circumscribed exhaustion requirement to CRIPA, the Court concluded that a broader exhaustion doctrine in Section 1983 cases was not mandated. The Court stated that "[i]t is not for us to say whether

Congress will or should create a similar scheme for other categories of § 1983 claims or whether Congress will or should adopt an altogether different exhaustion requirement for non-prisoner § 1983 claims." 457 U.S. at 515.

Having laid it down that exhaustion was not required, the Court appeared to retire from the field, leaving the matter of further inroads on its non-exhaustion rule for Section § 1983 actions to the Congress. *Collins v. King*, 743 F.2d 248, 251 (5th Cir. 1984). The judicial hibernation was to be all too brief, as a corollary doctrine applicable only to procedural due process cases waited in the wings. *Id.*

For a well-rounded view of our present status, *Parratt v. Taylor*, 451 U.S. 527 (1981) must be laid on the table. In *Parratt*, the Supreme Court held that a Nebraska state prisoner had failed to allege a violation of the due process clause of the fourteenth amendment in his suit to recover the value of a hobby kit, negligently lost by prison employees. Although the Court termed the injury sustained by the prisoner a deprivation of property under color of state law, it was not a cognizable constitutional injury because it was not "without due process of law". 451 U.S. at 537. The critical factor was the existence of an adequate post-deprivation remedy in the form of a tort suit in state court.

Following a split among the circuits on whether *Parratt* applied to intentional deprivations, the other shoe fell in the guise of *Hudson* v. *Palmer*, 104 S.Ct. 3194, 3203-04 (1984), answering the question in the affirmative: "We hold that an unauthorized intentional deprivation of property by a state employee does not constitute a violation of the procedural requirements of the due process clause of the fourteenth amendment if a meaningful post-deprivation remedy for the loss is available." *Id.* The *Parratt-Hudson* doctrine defines and limits the constitutional right itself, rather than the remedy. *Thibodeaux v. Bordelon*, 740 F.2d 329, 337-38 (5th Cir. 1984).

The existence of the state process does not immediately torpedo the Section 1983 claim. It is, however, incumbent on the plaintiff to prove that the state remedy is inadequate. *See Marshall v. Norwood*, 741 F.2d 761, 764 (5th Cir. 1984); *Vicory v. Walton*, 721 F.2d 1062, 1066 (6th Cir. 1983), *rehearing en banc denied*, 730 F.2d 466 (6th Cir. 1984). The inadequacy does not, however, necessarily stem from a lack of congruency between the state and federal relief available, *Loftin v. Thomas*, 681 F.2d 364, 365 (5th Cir. 1982). More relevant is an unreasonable delay in providing the remedy, *Eaton*, 598 F.Supp. at 1512, or unreasonable barriers to its availability. The fundamental requirement of due process is the opportunity to be heard and it is an opportunity which must be granted at a meaningful time and in a meaningful manner. *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965). *See also Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982).

Plaintiffs allege a deprivation of an ownership interest in certain property. This deprivation allegedly resulted from the intentional acts of a state employee and private individuals engaged in a conspiracy with him. These predicates are squarely within the *Hudson* framework.

Defendant urges that the appellate process constitutes an adequate state remedy for the deprivation. He cites *Cohen v. City of Philadelphia*, 736 F.2d 81 (3d Cir. 1984). Cohen, a police officer, was dismissed from his employment because of suspected participation in a burglary. After acquittal, he was reinstated without an award of back pay. He sued under Sections 1983 and 1985 claiming a deprivation of property without due process for the refusal of the Civil Service Commision to grant him back pay. The Third Circuit held that no § 1983 claim was established because Pennsylvania provided for judicial review of the Commission's actions and the courts were empowered to correct any of the Commission's actions if they were "manifest abuses of discretion, are contrary to

law, or rest on findings of fact which are not supported by substantial evidence." 736 F.2d at 86. To rule otherwise would create the danger that:

> any plaintiff in a state court who was asserting a right within the broadly defined categories of liberty or property and who lost his case because the judge made an error could attack the judgment indirectly by suing the judge under section 1983. That would be an intolerable interference with the orderly operations of the state courts. Due process is denied in such a case only if the state fails to provide adequate machinery for the correction of the inevitable errors that occur in legal proceedings. (citations omitted).

Obviously, Plaintiffs here are alleging transgressions more serious than "inevitable errors", but it is such transgressions that give rise to the intentionality of the deprivation. The concerns are the same.

Plaintiffs' description of the improprieties at trial before Defendant Walker range from subtle to flagrant disregard of applicable substantive and procedural law. Virtually all of these matters, including the allegations of bias, are among the 211 points of error urged on appeal from the state court trial. *See* Attachment to Defendant Wright's Motion for Summary Judgment, filed February 25, 1985; *Compare, e.g.*, Points of Error 10-12 *with* First Amended Complaint ¶¶ 46-60 and *passim*; Points of Error 20-24 *with* ¶¶ 87-88; Points of Error ¶¶ 74-79 *with* ¶¶ 92-94, 99-101; Points of Error ¶ 61 *with* ¶ 105; Points of Error *passim with* ¶¶ 115-116; Point of Error ¶54 *with* ¶117; Point of Error ¶ 67 *with* ¶121; Point of Error ¶19 *with* ¶51; Points of Error ¶¶ 96-100 *with* ¶¶ 133-136; Points of Error ¶¶ 200-201 *with* ¶140. In other words, the acts evidencing and causing the deprivation are, for the most part, errors of law raised on appeal.

The state appellate courts have the power and responsibility to correct errors of law committed at the trial court level. The state courts are empowered to grant the relief of reversal and/or the provision of a new trial, a direct redress that this Court can, at best, approach indirectly.

In addition to the undoing of the allegedly erroneous resolution of the trial, state law provides remedies for damages associated with improper legal action, such as causes of action for wrongful and negligent receivership, asserted in this action, and malicious prosecution.

Plaintiffs argue that Defendant Ayres is estopped from asserting that the right of appeal constitutes an adequate remedy because of "his strenuous efforts" to deny Plaintiffs their right to appeal. This contention is irrelevant. Regardless of Defendant Ayres' successful or unsuccessful advocacy before the Dallas Court of Appeals, other Defendants, whose hands are arguably cleaner, can and have asserted the same objection to Plaintiffs' constitutional claim. It is irrelevant for this analysis whether Plaintiffs are successful on their appeal, or have run afoul of the appellate process. The due process doctrine does not require the Court to track the eventual disposition of inmate Taylor's tort claim or Plaintiffs' appeal. It is the existence of an available remedy that limits the right.

Accordingly, the Court is of the opinion that Defendant's Motion for Summary Judgment should be granted with respect to Plaintiffs' procedural due process claim.

Substantive Due Process

Plaintiffs raise explicitly for the first time the contention that their due process claim is also a substantive one. *See* Plaintiffs' Response to Reply. Specifically, Plaintiffs state that their claim is for a violation of the constitutional right to a fair trial. The Amended Complaint is broadly-worded enough to support this claim.

Substantive due process is a nebulous concept at best. *Barnier v. Szentmiklosi*, 565 F.Supp. 869, 879 (E.D.Mich. 1983). It seems to have its origins in Justice Cardozo's notion of immunities "implicit in the concept of ordered liberty". *Id.*, *citing Palko v. Connecticut*, 302 U.S. 319, 325 (1937). In *Rochin v. California*, Justice Frankfurter appeared to define the fourteenth amendment's substantive prohibition to conduct "that shocks the conscience" or "offends the community's sense of fair play and decency". 342 U.S. 165, 172 (1952).

The existence of an adequate state remedy and the reasoning of *Parratt* do not apply to cases of substantive due process violations, because the state is forbidden to deprive one of the right in question under any circumstances, regardless of the process provided. *Duncan v. Poythress*, 657 F.2d 691, 704 (5th Cir. 1981), *cert. dismissed*, 459 U.S. 1012 (1982); *Nika Corp. v. City of Kansas City*, 582 F.Supp. 343, 360-61 (W.D.Mo. 1984). The right to a fair trial, before an unbiased judge, is a basic requirement of due process, *Nebraska Press Association v. Stuart*, 427 U.S. 539, 551 (1976); *Johnson v. Mississippi*, 403 U.S. 212 (1971), and is actionable under Section 1983. *Neal v. Brim*, 506 F.2d 6, 9 (5th Cir. 1975).

Plaintiffs allege that the rendition of free legal services by Defendants Kelsoe, Sessions and Wright and accounting services by Defendant Hurt several years prior to this litigation served as an inducement for Defendant Walker to be predisposed to Defendants' case. Plaintiffs' Response at 30. Defendant cites to Plaintiff Holloway's statement in a deposition that he was alleging the receipt of a bribe, Defendant's Exhibit 2 at 149, and proceeds to argue that the allegations do not meet the requirements of the criminal bribery statute. As Plaintiffs reply, this is not the point. The issue is a factual, not legal one, concerning whether Defendant Walker was motivated to act, be it out of agreement or gratitude, by the previous actions of Defendants.

Membership in Conspiracy

Plaintiffs allege that Defendant Ayres participated in a conspiracy with Defendant Walker to deprive them of their right to a fair trial. Of course, merely resorting to the courts and being on the winning side of a lawsuit does not make a party a co-conspirator or a joint-actor with the judge. *Dennis v. Sparks*, 449 U.S. 24, 28 (1980). More than a blanket of accusation is necessary to support a § 1983 claim. *Arsenaux v. Roberts*, 726 F.2d 1022, 1024 (5th Cir. 1982).

Thus, Plaintiffs must show by competent summary judgment evidence that Defendant Ayres' participated in an agreement to get the state court case improperly brought before Defendant Walker, or, once before him, agree to induce the judge to improperly rule.

Defendant provides an affidavit from an employee of the Dallas County District Clerk's Office present at the filing of the case in 1982. Martin Affidavit, Defendant's Exhibit 5. She attests that the case was "assigned to the 162nd Judicial District court solely by means of the random mechanical filing system then in use in the District Clerk's Office on May 26, 1982". Affidavit at 3. She further swears that no one tried to have her file the case in Defendant Walker's court. Plaintiffs attempt to rebut this with an affidavit from Burks Wylie, an employee of the Dallas County Auditor's office, describing an Administrative Order announcing the adoption of a new computerized filing system in June of 1982. Plaintiffs' Exhibit 1. The adoption of a random computerized system does not contradict the previous existence of a random "mechanical" system, as Defendant states.

Plaintiffs further present excerpts from depositions concerning widespread rumors of potential for forum shopping. Plaintiffs' Exhibit 2 contains only the grossest forms of hearsay, as Plaintiffs concede. *See* Plaintiffs' Reply to Motion to Strike,

filed March 5, 1985. Assuming that the deponent in Exhibit 3, Judge Snodgrass can somehow be qualified as an expert in docket control, as Plaintiffs argue, his testimony only states that there were rumors regarding forum-shopping in the 1970's and that an investigation failed to confirm the rumors. This evidence is insufficient to raise a fact issue concerning the filing of the case.

Turning to the events after the assignment of the case to Judge Walker, Plaintiffs base the inference of a conspiratorial agreement on the following:

> 1. Defendants Ayres, Kelsoe, Walker and former Defendant Musselwhite, attorney for the APP entities, met in Judge Walker's chambers immediately following filing of the suit. Albright Affidavit at 3, Plaintiffs' Exhibit 17. Albright concluded that this meeting concerned the merits of the case, because Walker greeted Albright, attorney for Humble, with the *sua sponte* proclamation, "Is this the man with the 8 million dollars?" Plaintiffs' Response at 10.
>
> 2. Defendants Ayres, Kelsoe and Walker conducted regular *ex parte* meetings with Defendant Walker before the beginning of trial, at noon, and at the end of the day, to which Plaintiffs' counsel were not invited. Bickel Affidavit, Plaintiffs' Exhibit 19; Albright Affidavit; Plaintiffs' Response at 16.
>
> 3. On the morning of August 16, 1982, Defendants Walker, Ayres, Hurt and Sessions met to discuss the special issues to be submitted to the jury. Hughes Affidavit, Plaintiffs' Exhibit 29.

Defendant, despite his affidavit to the contrary, acknowledges that there may be a question of fact regarding *ex parte* meetings. Response at A-8. He argues that there is no evidence

that counsel for Humble or Holloway were excluded from any such meetings if they had chosen to attend, as the meetings often appeared to be in plain view of Plaintiffs' counsel. Defendant further states that Plaintiffs' counsel frequently and voluntarily absented themselves from the proceedings. Defendant's Exhibit 4 at 8. Given the frequency of *ex parte* meetings alleged, there is indeed a fact question on the nature of these meetings.

Defendant argues that even accepting the existence of the *ex parte* meetings, they are insufficient as a matter of law to substantiate a conspiratorial agreement. He cites *Schaffer* v. *Cook*, 634 F.2d 1259, 1260 (10th Cir. 1980), where the court held insufficient an allegation that the Plaintiff saw one of the attorneys speak with the judge in the courthouse before each hearing. The court stated, "Nothing in the complaint indicates that the court or the attorneys were acting outside of the confines of the neutral function of a judicial forum." *Id.* The mere allegation of an occurrence of an *ex parte* meeting is indeed insufficient to raise a fact issue of an impropriety occurring during them. *San Filippo v. U.S. Trust Co. of New York, Inc.*, 737 F.2d 246, 256 (2d Cir. 1984). The presence of Defendant Ayres at an *ex parte* meeting at which Defendant Walker announced the decision to submit jury issues on "our" theory of the case goes beyond these precedents.

This factual issue, on a question sufficient to support an inference of a conspiratorial agreement, precludes the grant of summary judgment on the substantive due process claim as to Defendant Ayres.[3]

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[3] It appears that Plaintiffs also argue that the acts of co-conspirators can be imputed to show Defendant Ayres' agreement. The vicarious liability cannot be so extended; it only governs the fixing of liability once one's membership in the conspiracy is proven.

Subject Matter Jurisdiction

Defendant Ayres' reasserts the contention that a federal court lacks subject matter jurisdiction to, in effect, review the legal determinations of a state court.

In ruling on the various motions to dismiss, this Court relied on *Patsy, supra*, holding that because the alleged harms resulted not from the judicial decision-making functions of the state court, but from alleged improprieties in the conduct of judicial personnel and others, jurisdiction was proper.

Subsequent to this ruling, the Court's attention has been drawn to United States Supreme Court's clarification of this principle. In *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983), a § 1983 due process case brought by an attorney denied permission to practice before the D.C. Court of Appeals, the Court stated that a federal district court "has no authority to review final judgments of a state court in judicial proceedings". 103 S.Ct. at 1315. Rejecting the proposition that a constitutional complaint necessarily evades this principle, the Court stated:

> If the constitutional claims presented to a United States District Court are inextricably intertwined with a state court's denial in a judicial proceeding of a particular plaintiff's application for admission to the state bar, then the District Court is in essence being called upon to review the state court decision. This the District Court may not do.

Id. at 1315 n.16.

In *Hagerty v. Succession of Clement*, 749 F.2d 217 (5th Cir. 1984), the plaintiff, an unsuccessful challenger to a will in a state court probate suit, brought a § 1983 action against the estate, the executor of the will, the state trial judge, and the

clerk of the court, alleging that the state proceedings and the various actions of the trial judge had deprived him of property without due process of law. The Fifth Circuit affirmed the district court's dismissal under Rule 12(b)(1). The court stated:

> The constitutional claims presented by Hagerty to the federal district court, if not identical, were "inextricably intertwined with the state court's denial" of relief; therefore the district court could not have properly reviewed the state court decision. [citing *Feldman*]. To the extent that there was any constitutional error in the Louisiana state court decision, sole recourse for Hagerty was to the United States Supreme Court, not to the federal district court.

Defendant argues that in order to grant Plaintiffs all or any part of the relief sought, "the court will be obliged to decide matters of fact and/or law which have previously been decided, adverse to the Plaintiffs' claims in the state courts, and to judge for itself the ultimate correctness, intent or validity of the state courts' actions and decisions." Response at 19.

Plaintiffs respond that the primary relief sought is not to remand or reverse the state judgment, but to redress Plaintiffs monetarily and punish the conspirators for actions beyond the wrongful procurement of the state judgment. They state that "the merits of the state court proceedings are not at issue in this case" and that "a substantive appellate review of the correctness of various rulings made by Judge Walker" will not be required. Response to Reply at 11.

The Court accepts most of what both parties argue. Plaintiffs may be entitled to recover damages for the deprivation of their right to a fair trial. These damages would most likely be nominal, and would not include the value of the judgment awarded against them. *Carey v. Piphus*, 435 U.S. 247 (1978). To prevail

on this theory, Plaintiffs must factually and legally prove that an unfair trial was received *without regard to the validity* of Judge Walker's legal rulings and the outcome of the trial.[4] This limitation is mandated by and consistent with *Feldman, Hagerty* and the intent of this Court's earlier ruling on this issue.[5]

Although such erroneous rulings, according to Plaintiffs' theory, may be probative of the implementation of the alleged agreement to deprive Plaintiffs of their right to a fair trial, their constitutional significance is most certainly and indisputably intertwined with the state court's denial of relief. *Hagerty, supra.*

To grant much of Plaintiffs' requested relief, both legal and equitable, this Court would have to examine Judge Walker's rulings to determine which were harmless and which were reversible, causing damage. Such a review is forbidden.

The Court believes that this inquiry is not necessarily preempted by Judge Rolston's denial of Plaintiffs' motion to recuse Judge Walker. The Court is not being asked to provide relief that Judge Rolston denied. Denial of a motion to recuse in July of 1982 is not inconsistent with acts amounting to a denial of a fair trial in August. The distinction is between the existence of grounds for disqualification and actual demonstrated bias.

The Court, however, deems the application of collateral estoppel on issues determined by the recusal motion to be appropriate if and when the state court judgment becomes final. *See Archer v. Bill Pearl Drilling Co., Inc.*, 655 S.W.2d 338 (Tex.Civ.App. — San Antonio 1983, writ dism.).

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[4] Given this limitation, it may be substantially easier to prove the conspiracy to deprive than the deprivation itself.

[5] At this and other points, it is worth noting that state courts have jurisdiction to hear Section 1983 cases. *Sullivan v. University Interscholastic League*, 616 S.W.2d 170 (Tex.Civ.App. 1981). The same federalism-based limitations may not be present.

Conclusion

The Court is of the opinion that Defendant Ayres' Motion for Summary Judgment should be, and hereby is, GRANTED with respect to Plaintiffs' procedural due process claims and DENIED in all other respects.

SO ORDERED.
DATED: March 11, 1985.

/s/_____
BAREFOOT SANDERS
UNITED STATES
DISTRICT JUDGE

APPENDIX D

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS DALLAS DIVISION

PAT S. HOLLOWAY, Individually et al.	*	
Plaintiffs	*	Civil Action
v.	*	No. 3-82-1846-H
JUDGE DEE BROWN WALKER, et al.	*	
Defendants	*	Filed June 20, 1985

MEMORANDUM OPINION AND ORDER

This case is before the Court on Defendant APP Entities' Motion for Attorneys' Fees, filed May 17, 1985; Plaintiffs' Response, filed June 10, 1985; Defendant Kelsoe's Motion for Attorneys' Fees, filed May 21, 1985; Plaintiffs' Response, filed June 12, 1985; Defendant John Wright's Motion for Attorney Fees, filed May 21, 1985; Plaintiffs' Response, filed June 12, 1985; Judge Dee Brown Walker's Motion for Attorneys' Fees, filed May 23, 1985; Plaintiffs' Response, filed June 12, 1985; and Motion of HECI Exploration Company, Inc., and Sterling Pipeline Company for Bifurcation of Issues of Attorney's Fees, filed June 7, 1985.

On April 23, 1985, this Court entered a judgment in favor of all of the Defendants in this action brought under 42 U.S.C. § 1983. The basis of the Court's holding was that Plaintiffs had failed to articulate a tenable due process claim pursuant to recent developments in the case law of "adequacy of state

remedy". This judgment has been appealed to the United States Court of Appeals for the Fifth Circuit.

Title 42, Section 1988, provides:

> [T]he Court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

Several Defendants have moved for attorneys' fees under this provision. This section has been interpreted to provide for the recovery of costs by a prevailing defendant when a plaintiff maintains an unfounded action in bad faith, vexatiously, wantonly, or for oppressive reasons. *Kinnear-Weed Corp. v. Humble Oil & Refining Co.*, 441 F.2d 631, 636-37 (5th Cir.), *cert. denied*, 404 U.S. 941 (1971). *See also Christianburg Garment Co. v. EEOC*, 434 U.S. 412, 421 (1978).

In applying this test, the Court must not engage in *post hoc* reasoning; the reasonableness of a plaintiff's claim must be assessed as of the time the suit was filed. The test is *not* whether the claim was ultimately successful. *Plemer v. Parsons-Gilbane*, 713 F.2d 1127, 1141 (5th Cir. 1983).

By this standard, the Court can find no basis for the award of attorneys' fees. All Defendants filed motions to dismiss Plaintiffs' complaint. Each motion was denied by the Court based upon an application of then-existing precedent. Much discovery was done and several summary judgment motions were filed. Only with respect to one set of Defendants (the so-called "Browning Interests") did the Court find the factual basis of the action to be inadequate. The final disposition of the case came only after extensive briefing and, indeed, one motion for reconsideration addressed to the application of the recent Supreme Court decision in *Hudson v. Palmer*, 104 S.Ct. 3194 (1984). *Hudson* marked a clear extension of prior law, requiring the consideration of the adequacy and availability of

state law remedies in instances of alleged violations of procedural due process. *Compare McCrae v. Hankins,* 720 F.2d 863 (5th Cir. 1984). This evolution of the law was the sole basis for the disposition of this action with respect to the moving Defendants and is an insufficient basis to find frivolity. *Reineman v. Valley View Comp. School District,* 539 F.Supp. 876, 877 (N.D.Ill. 1982). Shifting several hundred thousand dollars of attorneys' fees would serve only to freeze potentially meritorious civil rights actions in their tracks.

This action has been difficult to resolve, both for the parties and the Court. It may be still years removed from its conclusion. Accordingly, the Court is of the opinion that Defendants' Motions for Attorneys' Fees should be, and hereby are, DENIED.

SO ORDERED.
DATED: June 20, 1985.

/s/_____
BAREFOOT SANDERS
UNITED STATES
DISTRICT JUDGE

APPENDIX E

Pat S. HOLLOWAY, et al.,
Plaintiffs-Appellees,

v.

Judge Dee Brown WALKER, et al.,
Defendants,

Judge Dee Brown Walker,
Defendant-Appellant.

No. 84-1772.

United States Court of Appeals,
Fifth Circuit.

July 18, 1985.

Rehearing and Rehearing En Banc
Denied Sept. 4, 1985.

Appeal from the United States District Court for the Northern District of Texas.

Before JOHNSON, JOLLY and HILL, Circuit Judges.

E. GRADY JOLLY, Circuit Judge:

This interlocutory appeal presents questions relating to the asserted defense of judicial immunity. Texas Judge Dee Brown Walker and other defendants are alleged to have seized control of Humble Oil pursuant to a conspiracy to deprive the legitimate owners of Humble of their property without due process of law.

The appellee and others brought suit for damages and equitable relief under 42 U.S.C. § 1983, charging that Walker abused his office by imposing a receivership on Humble, appointing an incompetent administrator, and largely wrecking the corporation in accordance with the aims of the conspiracy. Walker moved to dismiss all claims against him, arguing that the plaintiffs had failed to present allegations sufficient to warrant injunctive relief and, in addition, arguing that his judicial immunity bars this suit. The district court dismissed Walker's motion. Because we find the order denying immunity from damages is an appealable order, and that Walker is entitled to the protection of absolute judicial immunity from damages in this case, we reverse the district court, and order the dismissal of the damages action against him. Moreover, we dismiss all pendent state law claims on eleventh amendment grounds. We find no other appealable order in this case, and accordingly dismiss the remainder of the appeal.

I

In reviewing this order denying dismissal, we do not go outside the pleadings. We accept all well pleaded facts as true and view them in the light most favorable to the plaintiff. *Carpenters Local Union No. 1846 v. Pratt-Farnsworth, Inc.*, 690 F.2d 489, 500 (5th Cir. 1982). We cannot order a dismissal "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S.Ct. 99, 101-02, 2 L.Ed.2d 80, 84 (1957); *Cook & Nichol, Inc. v. Plimsoll Club*, 451 F.2d 505, 506 (5th Cir. 1971).

II

The complicated history of this case begins on September 12, 1979 when the Brownings, defendants in the present case,

filed suit against Humble, Holloway and others in the 193rd Judicial District Court of Dallas County, Texas, seeking, as the alleged equitable owners of substantially all of the assets of Humble and Holloway, the imposition of a constructive trust on Humble's and Holloway's assets, actual and exemplary damages, and the appointment of an interim receiver to manage the disputed assets. Sterling Pipeline Company was later added to the case. (The lawsuit is hereinafter referred to as the "1979 case.") On November 19, 1979, Humble and Holloway filed Chapter 11 voluntary bankruptcy petitions and removed the 1979 case to the United States District of Texas, pursuant to 28 U.S.C. § 1478(a).

The parties entered a "Stipulation and Agreement on Manner in Which Controversy Shall Be Heard, Determined and Liquidated," which was approved by the bankruptcy court and annexed to the court's January 18, 1980 "Order Remanding Causes of Action and Modifying Automatic Stay." The remand order remanded the 1979 case to the 193rd Judicial District Court pursuant to the terms of the stipulation and agreement, and modified the automatic stay to permit trial of the case upon remand, subject to the terms of the stipulation and agreement. The stipulation and agreement provided, among other things, that upon remand of the case the parties would request the presiding judge of the administrative judicial district to assign a visiting or retired state judge to hear the consolidated cases.

The case was remanded and the presiding judge assigned it to a retired state judge who ordered enforcement of a prior settlement agreement. In 1981, the Court of Appeals for the Fifth Supreme Judicial District of Texas (the "Texas court of appeals") reversed the order enforcing the settlement agreement and remanded the case for a jury trial. The Texas Supreme Court found no reversible error. Upon remand from the state appellate courts, the 1979 case was assigned to a different retired

state judge who entered an order nullifying the prior settlement agreement.

On May 26, 1982, a group of investors sued Holloway and Humble in the 162nd Judicial District Court of Dallas County, Texas, Judge Dee Brown Walker presiding, claiming that Humble had wrongfully shut-in over 150 oil and gas wells jointly owned by the investors and Humble. This suit is alleged by Holloway to have been brought pursuant to the conspiracy, solely for the purpose of creating a case before Walker into which the 1979 action could be consolidated, in violation of the agreement that restricted the judge who could hear the 1979 action to one who had retired or was visiting the judicial district. The investors sought the appointment of a receiver over Humble's assets. (The case is hereinafter referred to as the "1982 case.") The Brownings were named as defendants in the 1982 case because of their claim to ownership of Humble's and Holloway's assets. The 1982 case was removed to the bankruptcy court and remanded to Judge Walker's court on the same day.

On May 28, 1982, Judge Walker appointed a receiver in the 1982 case over Humble's and Holloway's assets. Thereafter "ensued a somewhat dizzying sequence of state court orders," most of which were issued by Judge Walker, and recounted in *Browning v. Navarro*, 37 B.R. 201, 205-06 (D.C.N.D. Tex. 1983), which resulted in the transfer and consolidation of the 1979 case into the 1982 case before Judge Walker in the 162nd Judicial District Court. On June 24, 1982, the May 28, 1982 receivership order having been vacated by the state court of appeals,[1] Judge Walker granted the Brownings' request for a separate and expedited trial of the 1979 case. On August 26, 1982, after a month-long trial, judgment was entered in the

[1] *Humble Exploration Co. v. Fairway Land Co.*, 641 S.W.2d 934 (Tex.App. — Dallas 1982 writ ref'd n.r.e.) *enforced*, 641 S.W.2d 941 (Tex.App.—Dallas 1982, no writ).

1979 case for the Brownings, imposing a constructive trust on Humble's and Holloway's assets and awarding the Brownings actual damages of $72,000,000 and exemplary damages of $10,000,000.

On November 18, 1982, Holloway and Humble brought the action in which the present appeal is taken (the "civil rights case") against Judge Walker, the Brownings, legal counsel for the Brownings and many others, alleging that all the defendants had conspired to violate Holloway's and Humble's civil rights in the 1979 case. The complaint alleges that Walker and the other defendants conspired to seize control of Humble through the abuse of Walker's judicial office. Holloway contends that pursuant to the conspiracy Walker arranged to have the 1982 case brought before his court contrary to the usual procedure for assigning cases, that Walker thereafter arranged to have the 1979 and the 1982 cases consolidated in his court, that he imposed receiverships on Humble's and Holloway's assets, defied a mandamus order of the Texas Court of Appeals to refrain from interfering in Humble's business, appointed an incompetent receiver for Humble, dismissed many Humble personnel, posted guards at Humble's headquarters to seize the building, and, in a hotel near the courthouse, conducted meetings regarding Humble's business, all in furtherance of the conspiracy. Holloway contends extensive damage was done to him and Humble through Walker's pernicious actions. Holloway's complaint, broadly construed, may be interpreted to allege that Walker may have acted pursuant to a bribe, although the complaint does not use that word. Accordingly, we will treat the complaint as alleging both bribery and conspiracy.

Holloway's complaint request damages as well as equitable and declaratory relief under section 1983. In addition, Holloway requests similar relief under Texas state law.

After Holloway and Humble filed the civil rights case they perfected an appeal from the judgment in the 1979 case to the

Texas court of appeals. The Texas court of appeals was the appropriate Texas appellate court to hear the appeal of a case from Judge Walker's court. However, neither Humble nor Holloway posted a supersedeas bond to stay execution of the judgment in the 1979 case pending their appeal.

The Brownings then brought an action in the United States District Court (the "turnover action") to obtain possession of Holloway's and Humble's assets which, according to the judgment in the 1979 case, were being held for their benefit. Humble, Holloway and their trustee, Don Navarro, refused to turn the assets over to the Brownings. They argued that the proceedings before Judge Walker, an active judge, were void because the 1979 case was tried in contravention of the bankruptcy court's original remand order. The United States District Court granted a summary judgment in favor of Navarro and held that the trial of the 1979 case before Judge Walker was void. This court, however, reversed the district court's determinations and held that the trial before Judge Walker was not void because the remand order had been satisfied. *Browning v. Navarro*, 743 F.2d 1069 (5th Cir. 1984).

The appeal of the 1979 case was pending in the Texas court of appeals while the turnover action was being litigated in the United States District Court. The Texas court of appeals, however, believed that the turnover action constituted a collateral attack on Judge Walker's judgment in the 1979 case. Therefore, the Texas court of appeals dismissed Humble's and Holloway's appeal[2] because it did not believe Humble and Holloway were entitled to two appeals from the judgment in the 1979 case. However, following this court's reversal of the district court's decision in the turnover action, the Texas court of appeals vacated its prior order dismissing the appeal of the 1979 case.

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[2] *Humble Exploration Co. v. Browning*, 677 S.W.2d 111 (Tex.App.—Dallas, 1984, no writ).

From the appellate briefs before us, it appears the appeal of the 1979 action is now pending before the Texas courts, although the status of that appeal is not material to our decision in this case.

On December 8, 1982 Judge Walker filed a motion to dismiss the civil rights case based upon the doctrine of judicial immunity and the district court's lack of subject matter jurisdiction. On August 21, 1984 the district court entered its order denying Judge Walker's motion to dismiss. Thereafter, on October 16, 1984, the district court refused to amend its August 21 order to provide for an interlocutory appeal under 28 U.S.C. § 1292(b). Notwithstanding the district court's refusal to certify, Judge Walker now appeals the denial of immunity.

III

[1] A threshold issue we must first determine is whether this court has jurisdiction to hear this appeal. Orders denying absolute immunity are automatically appealable under *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 69 S.Ct. 1221, 93 L.Ed. 1528 (1949). *Williams v. Collins*, 728 F.2d 721 (5th Cir. 1984). Accordingly, it appears certain that this court has jurisdiction to hear the appeal from the district court's denial of judicial immunity from suit for damages. Holloway, however, denies the appealability of the present order, citing *Collins*:

> We caution that, despite the rule we announce today, many denials of claimed immunity in pretrial proceedings will not be in a posture for appellate review, in that entitlement to immunity *will turn on disputed questions of fact or will otherwise be inextricably bound up with the merits of the claims.*

Collins at 726 n.7 (emphasis supplied). However, taking all well pleaded facts as true, we nevertheless find the complaint is insufficient to avoid Judge Walker's immunity. The caveat of footnote 7 therefore does not apply, and the order denying immunity is appealable.

IV

A

[2] It is a well established rule that where a judge's absolute immunity would protect him from liability for the performance of particular acts, mere allegations that he performed those acts pursuant to a bribe or conspiracy will not be sufficient to avoid the immunity. *Sparks v. Duval Ranch Co.*, 604 F.2d 976 (5th Cir. 1979) (en banc), *aff'd sub nom. Dennis v. Sparks*, 449 U.S. 24, 101 S.Ct. 183, 66 L.Ed.2d 185 (1980). In *Sparks* we said:

> The material allegations in this case are . . . that [the] state judge . . . conspired with the four private defendants to deprive the plaintiffs of their oil production. This the judge did by entering an injunction, within his judicial powers to grant, prohibiting plaintiffs from producing certain oil. It is claimed that one of the defendants . . . bribed him to do this, while the other two, in knowing furtherance of the conspiracy, acted as sureties for the injunction bond. [The state judge] was, of course, unqualifiedly immune from suit for the damages occasioned by his judicial act, and as to him the suit was correctly dismissed.

Sparks at 978.

[3] The Supreme Court affirmed this court's holding: "As the case comes to us, the judge has been properly dismissed from the suit on immunity grounds." 101 S.Ct. at 186. Notwithstanding *Sparks*, Holloway strongly contends that the acts of conspiring and taking a bribe are not "judicial acts" even when directed at inducing a judge to take action for which he is entitled to absolute immunity. Holloway relies on *Rankin v. Howard*, 633 F.2d 844 (9th Cir. 1980), as support, noting that judicial immunity extends only to "judicial acts" performed without "a clear absence of all jurisdiction." *Stump v. Sparkman*, 435 U.S. 349, 98 S.Ct. 1099, 1105-07, 55 L.Ed.2d 331 (1978). The *Rankin* court "conclud[ed] that a judge's private prior agreement to decide in favor of one party is not a judicial act," 633 F.2d at 847, and, accordingly, denied immunity for damages resulting from a decision predicated on such a prior agreement. This court does not follow *Rankin*; rather, we defer to the Supreme Court and our own en banc decision. Moreover, even if this were a case of first impression, we would decline to follow the Ninth Circuit's path simply because this aspect of *Rankin* is inconsistent with the fundamental policies underlying judicial immunity.

Among the first cases incorporating judicial immunity into federal jurisprudence was *Bradley v. Fisher*, 13 Wall. 335, 20 L.Ed. 646 (1872), which identified five reasons for immunity: first, and most important, a judge must be free to act upon his own convictions, without apprehension of personal consequences to himself; second, the controversiality and importance of the competing interests in contest before a court make it likely that the inevitable losing party may be overly willing to ascribe malevolent motives to the judge; third, judges faced with the prospect of damages actions would be driven to wasteful and distractive self-protection devices, such as excessive record-keeping; fourth, alternative remedies such as appeal and impeachment reduce the need for private rights of action

against judges; and, fifth, the ease of alleging bad faith would make a qualified "good faith" immunity virtually worthless. *Bradley*, 13 Wall. at 347-54. These factors retain their vitality today. *Butz v. Economou*, 438 U.S. 478, 98 S.Ct. 2894, 2912, 57 L.Ed.2d 895 (1978). To them one may add the need for finality of judgment.

There is little question that each of the *Bradley* factors applies as forcefully in cases, such as this one, involving allegations of conspiracy or bribery as to cases involving allegations of judicial "bad faith." It requires little skill or imagination to convert many allegations that a judge has ruled in "bad faith" into allegations that he conspired to do so or was bribed; thus, the threat to disinterested decision-making is similar. An embittered, losing party is just as likely to allege bribery or conspiracy as any other malevolent motive of a judge. The possibility that judges will be driven to wasteful and distracting self-protective measures is just as great where liability could flow from conspiracy or bribery charges as from a charge of "bad faith." The same alternative remedies of appeal and impeachment (and in Texas, recourse to the voters) are available where the judge was bribed to commit an unsavory act or conspired to commit the act as where he simply commits acts in "bad faith." Finally, the threat to the finality of decision-making is the same where one alleges a judge conspired or was bribed to abuse his office as where one alleges he abused it in "bad faith." In summary, the need for a private right of action against a judge is no greater and the threat to the independence of judicial decision-making is no less where the allegations are of conspiracy or bribery than where the allegations are of bad faith, personal interest or outright malevolence. Thus, where the alleged harm, though resulting from a bribe or conspiracy, was inflicted by acts to which absolute immunity would apply, the complaint is insufficient to avoid judicial immunity. Accordingly, the complaint in the present case is

sufficient to avoid Judge Walker's absolute immunity only if it alleges harm that did not result from the acts to which his immunity applies, and this it fails to do.

B

[4] All of the harms Judge Walker is claimed to have caused are alleged to have been perpetrated by him through judicial acts not performed in the clear absence of all jurisdiction; accordingly Judge Walker's immunity bars a damages claim against him for these harms.

The complaint alleges that Judge Walker arranged to have cases brought in his court, placed the Humble Oil Company into receivership, discharged many of its key employees, posted in its corporate headquarters guards who intimidated and frightened its personnel, seized control of all of its stock, and appointed an incompetent receiver for the company. The complaints further allege that many of these acts were committed in open defiance of a proscriptive writ of the Texas Court of Appeals ordering him to desist from interference in the affairs of the Humble Corporation. Holloway urges that this proscriptive writ clearly deprived Walker of all jurisdiction and thus stripped him of judicial immunity from liability for these acts. We do not agree.

Judicial immunity does not extend to acts committed with a clear absence of all jurisdiction. However, the term "jurisdiction" is to be broadly construed to effectuate the policies of guaranteeing a disinterested and independent judicial decision-making process. *Stump v. Sparkman*, 98 S.Ct. at 1005. Where a judge does not clearly lack all subject-matter jurisdiction, he does not clearly lack *all* jurisdiction, and "the same principle of exemption from liability which obtains for errors committed in the ordinary prosecution of a suit where there is jurisdiction of both subject and person, applies in cases of this kind, and for

the same reasons." *Bradley*, 13 Wall. at 352.[3] Judge Walker's was a court of general jurisdiction under Texas law; there is no question that he was generally empowered to conduct proceedings of the sort he conducted. "[I]n our view, it is . . . significant that there was no . . . statute and no case law . . . prohibiting . . . a court of general jurisdiction, from considering a petition of this kind." *Stump*, 98 S.Ct. at 1105.

Holloway argues that the Texas Court of Appeals clearly deprived Walker of all jurisdiction with its writ of prohibition, which ordered Walker to desist from interfering in the affairs of the Humble Corporation. In response, Walker argues that the prohibition order did not obviously apply to his orders promulgated in accordance with his court's control of the Humble stock owned by Holloway, but only to orders concerning Humble which were promulgated pursuant to the Humble corporate receivership. Whatever the merits of Walker's argument, it is indisputable that the prohibition did not purport to determine that Walker's court was without general subject-matter jurisdiction. Indeed, the Texas Court of Appeals did *not* characterize its writ as a determination that Judge Walker was without all subject-matter jurisdiction; rather, the Texas Court of Appeals noted that Judge Walker's court did have subject-matter jurisdiction, but that he was acting in excess of that jurisdiction in continuing to conduct proceedings in the face of an effective order to desist: "*If our order became effective immediately, . . . then* the trial court was without jurisdiction." *Humble Exploration Co. v. Walker*, 641 S.W.2d 941, 943 (Tex.App.—Dallas 1982, no writ). The prohibition order in this case did not even suggest, much less expressly determine, a clear absence of all subject-matter jurisdiction; accordingly, he had sufficient jurisdiction for section 1983 immunity pur-

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[3] *Rankin* appears to misinterpret fundamentally this quoted language.

poses, even if he was without sufficient jurisdiction to conduct proceedings under Texas law.[4]

Nor is Walker alleged to have caused harm through acts other than the misuse of his court's power to issue injunctions and place the parties before him into receivership. But for those obviously "judicial acts," none of the harm Walker is alleged to have caused would have come about. As noted above, it is irrelevant that Walker is alleged to have performed those acts pursuant to a bribe or a conspiracy; they remain "judicial acts."

[5] Holloway argues that many of Walker's acts were not "judicial" because they were performed outside the courtroom[5] and that Walker eventually came to act more like the chief executive officer of the Humble corporation than like a judge. Holloway cites the four factors set out in *McAlester v. Brown*, 469 F.2d 1280 (5th Cir. 1972) as relevant to the determination of whether an act is "judicial": (1) whether the precise act complained of was a normal judicial function; (2) whether the events involved occurred in the courtroom or adjunct spaces, such as the judge's chambers; (3) whether the controversy centered around a case then pending before the judge; and (4) whether the act arose directly and immediately out of a visit to the judge in his official capacity. *McAlester* at 1282. As with "jurisdiction," the term "judicial act" must be broadly construed to realize the policies behind immunity; while the

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[4] We do not, of course, intimate that a prohibition order from an intermediate court of appeals would have been alone sufficient to deprive Judge Walker of all jurisdiction for immunity purposes even if the order had clearly stated that his court was without subject matter jurisdiction. It is noteworthy that the Texas Supreme Court does not consider a judge to be exposed to suit under Texas law merely because he would be subject to a mandamus order. *Turner v. Pruitt*, 161 Tex. 532, 342 S.W.2d 422 (1961).

[5] Specifically, Holloway draws attention to meetings among the defendants, held in a hotel near the courthouse and in courthouse hallways, at which Humble's affairs were considered.

four-part *McAlester* test will often suffice to determine that an act is "judicial," it is not the only test, and each of its factors are not to be given equal weight in all cases. For example, in exigent circumstances judges sometimes issue arrest or search warrants in police stations or in their own homes; in such cases, as here, the second *McAlester* factor will be lacking, but the act is obviously "judicial." The Supreme Court has forcefully indicated that the limits of judicial immunity are not to be set by subtle legalistic distinctions; rather, a broad functional approach is required: "Judges have absolute immunity not because of their particular location within the Government but because of the special nature of their responsibilities." *Butz*, 98 S.Ct. at 2913. Even administrative officials acting as judges, often without courtrooms or chambers, and without the technical jurisdictional confines of a state or federal court, nevertheless are protected by absolute judicial immunity. *Id.* The same is true of private arbitrators and other "quasi-judicial" figures. *Austin Municipal Securities, Inc. v. National Ass'n of Securities Dealers, Inc.*, 757 F.2d 676 (5th Cir. 1985). To place too much emphasis on the second *McAlester* factor in this case would be inconsistent with the broad functional approach of *Butz* and its progeny.[6]

The necessary functions of a judge often include administering remedies as much as determining the allocation of rights among the parties. On occasion a judge will find it necessary to administer a business, or a school district, or an entire prison system to effectively remedy a wrong. While the courts have traditionally drawn back from such detailed involvement in the affairs of the parties, that is no reason to deprive a judge of immunity. Texas law concededly allows for judicially imposed and monitored corporate receiverships; thus, Judge Walker's

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[6] In some cases, as where a judge cites a person for contempt of court, the second *McAlester* factor may almost dispositively indicate the act is "judicial."

judicial acts might be alleged to be inappropriate, but cannot be described as nonjudicial. Issuing injunctions and imposing a receivership in a case before the court are acts obviously satisfying factors (1), (3) and (4) of the *McAlester* test. That some of these acts may have occurred outside the courtroom is not particularly important where it is at least arguable that the nature of the remedy — the receiverships — might naturally entail such informal proceedings. Accordingly, we hold that the complaint fails to allege that Judge Walker acted other than in his judicial capacity.

V

Walker also appeals from the district court's denial of his motion to dismiss Holloway's claims for injunctive and declaratory relief. Holloway requests declaratory relief vacating various judgments entered by Walker and an injunction prohibiting Walker from unlawfully interfering with Humble's affairs in the future in either his official or private capacity.

A

[6, 7] Because the denial of a motion to dismiss under Fed. R.Civ.P. 12(b)(6) is not appealable, we must dismiss Walker's appeal from the district court's denial of his motion to dismiss the equitable and declaratory claims brought under section 1983. Judicial immunity does not extend to suits for equitable and declaratory relief under section 1983. *Pulliam v. Allen*, ___ U.S. ___, 104 S.Ct. 1970, 80 L.Ed.2d 565 (1984). Accordingly, cases involving claims for equitable and declaratory relief do not implicate the policies underlying *Collins*; that case was bottomed on the need to minimize the possibility that a judge would be needlessly put through a trial on a damages claim that was precluded by judicial immunity.

B

[8, 9] Walker also moved in district court to dismiss the pendent state law claims against him; this motion was also denied. However, a state official is immune from suit in federal court for equitable relief based on state law because the eleventh amendment denies federal courts the jurisdiction to issue such injunctions against state officials. *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 104 S.Ct. 900, 79 L.Ed.2d 67 (1984). Nor does this case fall under the "ultra vires" exception to eleventh amendment immunity. "[A] state officer may be said to act *ultra vires* only when he acts 'without any authority whatever' "; we have already seen that Walker's operative acts were judicial and not committed in the clear absence of all jurisdiction. *Pennhurst*, 104 S.Ct. at 908 n.11. Thus, Walker is immune from suit for equitable relief based on state law.[7]

We therefore hold that Walker is immune from federal suit seeking equitable relief on state law grounds under *Pennhurst*. Accordingly, we reverse the district court and order all pendent state law claims, equitable and declaratory, as well as legal, dismissed.

VI

In this case we have determined that Judge Walker is not alleged to have committed acts which were either not "judicial

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[7] Because the issue of eleventh amendment immunity concerns a vital issue of jurisdiction as much as it concerns immunity, we must consider the question on our own motion. *Edelman v. Jordan*, 415 U.S. 651, 94 S.Ct. 1347, 1363, 39 L.Ed.2d 662 (1974); *Save the Bay, Inc. v. United States Army*, 639 F.2d 1100, 1102 (5th Cir., 1981); Fed.R.Civ.P. 12(h)(3). "[Eleventh Amendment] limitation . . . may be raised at any point in a proceeding." *Pennhurst*, 104 S.Ct. at 907, n.8.

acts" or "in the clear absence of all jurisdiction," as those terms are used in immunity analyses. We have therefore held that Holloway's claims for section 1983 damages and all of his pendent Texas state law claims must be dismissed on immunity grounds. Finally, we have held that this court is without jurisdiction to hear an interlocutory appeal from the district court's denial of Walker's Rule 12(b)(6) motion to dismiss the equitable and declaratory claims against him brought under section 1983. Accordingly, we reverse the district court on all claims properly before us and dismiss all damage claims and all state law claims against Walker for failure to state a claim upon which relief may be granted. The remainder of the appeal is dismissed.

REVERSED IN PART, DISMISSED IN PART.

JOHNSON, Circuit Judge, dissenting.

I respectfully dissent. Under the current procedural posture of the instant case, the plaintiffs have sufficiently alleged acts committed after the Texas Court of Appeals' mandamus order which were in the "clear absence of all jurisdiction." *See Stump v. Sparkman*, 435 U.S. 349, 357, 98 S.Ct. 1099, 1105, 55 L.Ed.2d 331 (1978). Accordingly, I would affirm the district court's interlocutory decision that plaintiffs' cause of action against Judge Walker should not be dismissed on immunity grounds.

APPENDIX F

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PAT S. HOLLOWAY,
Plaintiff-Appellant,

v.

JUDGE DEE BROWN WALKER, et al.,
Defendants-Appellees.

No. 85-1289

OPINION

Filed May 30, 1986

Before: Charles Clark, Chief Judge, Henry A. Politz, and Jerre S. Williams, Circuit Judges.

Appeal from the United States District Court
for the Northern District of Texas
Barefoot Sanders, District Judge, Presiding

ON PETITION FOR REHEARING
(Opinion March 19, 1986, 5th Cir. 1986, 784 F.2d 1294)

OPINION

CHARLES CLARK, Chief Judge:

In his petition for rehearing, appellant Holloway cites authority from several circuits conflicting with the decisions rendered by this court in the present case and in *Collins v. King*, 743 F.2d 248 (5th Cir. 1984). In *Bretz v. Kelmon*, 773 F.2d 1026,

1027 (9th Cir. 1985) (en banc), the plaintiff alleged that police, prosecutors and various personal enemies conspired to falsely accuse and prosecute him for burglary. The court found that *Parratt/Hudson* did not bar the plaintiff's claim for three reasons. First, the court stated that *Parratt* only applies to minor deprivations of liberty or property. Second, the court found that a conspiracy, by definition, cannot be a "random" act within the meaning of *Parratt*. Third, the court concluded that *Logan*, rather than *Parratt*, controls when a plaintiff challenges a "direct abuse of the state process itself." *Id.* at 1031.

[1] We do not agree with the reasoning of the *Bretz* court. Nothing in *Parratt* or *Hudson* suggests that the holdings of these cases are confined to minor deprivations of liberty or property. If the Supreme Court intended these cases to announce a constitutional rule of lex non curat de minimis, it would have said so. *Compare Nickens v. White*, 536 F.2d 802, 803 (8th Cir. 1976) (prisoner's property interest in an office supply catalogue was so minor that confiscation of the catalogue did not implicate his due process rights).

[2] The Ninth Circuit's conclusion that a conspiracy cannot be a random act is also unpersuasive. From the point of view of the state a conspiracy among its employees can indeed be a random act if the state cannot anticipate or control such conduct in advance. *See Hudson v. Palmer*, ___ U.S. ___, 104 S.Ct. 3194, 3203, 82 L.Ed.2d 393 (1984). Of course, a conspiracy is not random from the point of view of the conspirators but this is to say no more than that a conspiracy is an intentional act, rather than a negligent one. The effect of the Ninth Circuit's holding is to revive the intentional/negligent act distinction, rejected in *Hudson*, in another form.

Finally, we decline to follow the view of the Ninth Circuit that *Logan* extends to an illegal conspiracy case. *Logan* did not involve abuse of an established state procedure but rather the operation of an inadequate state procedure. Put another

way, Logan was deprived of due process not because the Commission illegally delayed in acting on his claim but because the established state procedure failed to provide Logan with a remedy to correct the Commission's illegal delay in acting. By contrast, in *Bretz*, as well as in the present case, the plaintiffs had adequate appellate remedies to correct the deprivations caused by the illegal acts of the conspiring parties.

[3] Holloway also cites *Patterson v. Coughlin*, 761 F.2d 886 (2d Cir. 1985), *cert. denied*, 106 S.Ct. 879 (1986), which involved a prisoner who was charged with assault and interference with an employee. Prison officials held a hearing to consider the charges but, in contravention of state law, did not allow the prisoner to call any witnesses. The Court of Appeals reversed the district court's dismissal of Patterson's suit against various prison officials for failure to provide him with a constitutionally adequate predeprivation hearing. The district court had reasoned that because established state procedure provided for such a hearing but was allegedly not followed, no meaningful predeprivation hearing was possible. In reversing, the Court of Appeals reasoned that official conduct could violate a due process liberty interest and that such conduct was actionable under § 1983. The Court rejected the applicability of *Parratt/Hudson* to the case before them holding that whether conduct of a state official was "random" or "unauthorized" for *Parratt/Hudson* purposes must be "viewed from the position of one who possesses the state-delegated authority to grant a hearing when circumstances and the Constitution so require." *Id.* at 892. Since the officials with the power to give Patterson a constitutionally adequate hearing had failed to do so, the Second Circuit found *Parratt/Hudson* inapplicable.

[4] The difficulty with this position is that in *Hudson*, the Supreme Court expressly rejected a similar argument:

> [Respondent] contends that, because an agent of the state who intends to deprive a person of his property

> "*can* provide predeprivation process, then as a matter of due process he must do so." . . . This argument reflects a fundamental misunderstanding of *Parratt*. There we held that postdeprivation procedures satisfy due process because the *state* cannot possibly know in advance of a negligent deprivation of property. Whether an individual employee himself is able to foresee a deprivation is simply of no consequence. The controlling inquiry is solely whether the state is in a position to provide for predeprivation process.

___ U.S. ___, 104 S.Ct. at 3204.

[5] The ability of the individual state employee to provide predeprivation process does not determine whether a due process violation has taken place. When state procedures provide due process and are violated by a random or unauthorized act of a state employee, even a high-ranking state employee. *Parratt/Hudson* establishes that no federal constitutional due process violation has occurred.

[6] While we recognize that the due process clause "requires more than the mere *promulgation* of laws and regulations which, if followed, would preserve the most fundamental of rights," *Patterson, supra,* 761 F.2d at 891, we are not persuaded that this fact requires confining *Parratt/Hudson* to the actions of low level state employees who lack the power to grant a hearing. If laws and regulations providing due process exist in theory but are systematically ignored in fact then clearly a deprivation of liberty or property, though technically unauthorized by these laws, would not be "random." On the other hand, if the state system, by procedure and in ordinary practice, does in fact provide the plaintiff with due process, no violation of the guarantee contained in the national constitution occurs merely because the official who randomly deprives him of liberty or property without the hearing required by state law has

the power to grant such a hearing. In the case at bar, of course, there is no evidence or even suggestion that Texas has merely promulgated rules against judicial bias and conspiracy but in fact condones such behavior; rather, it is clear that any violation of these rules by a Texas judge would be a random act.

Holloway also relies on *Wolfenbarger v. Williams*, 774 F.2d 358 (10th Cir. 1985), *cert. denied*, 106 S.Ct. 1376 (1986). In that case the court found that the district attorney of Commanche County in Oklahoma had established a department-wide policy of summarily seizing allegedly stolen property and of returning this property to the alleged true owner without a hearing. This policy violated established state procedure but the court found that *Parratt/Hudson* did not bar an action by a pawnshop owner for deprivation of property without due process. The court held that a deprivation of property pursuant to a local policy could violate due process even though the policy was contrary to a state law comporting with the requirements of due process. *Id.* at 365. *See Gregory v. Town of Pittsfield*, ___ U.S. ___, 105 S.Ct. 1380, 1382, 84 L.Ed.2d 399 (1985) (O'Connor, J., with whom Brennan, J., and Marshall, J., join dissenting from denial of certiorari) (questioning whether a municipal policy denying constitutionally required procedures comports with the Constitution merely because the policy is contrary to state law).

The *Wolfenbarger* opinion elicited a strong dissent from Judge Seth, who pointed out that from the point of view of the state the actions of the district attorney were random and unauthorized. Since the state was unable to prevent "a public employee [from] directing action contrary to state law in a random way." Judge Seth argued that *Parratt/Hudson* properly applied. *Wolfenbarger, supra*, 774 F.2d at 367 (Seth, J., dissenting).

[7] It is unnecessary for us to consider *Wolfenbarger's* applicability in this circuit for if we agree with the majority

view, the result reached in the present case would remain unchanged. By no stretch of the imagination can Judge Walker's alleged conspiracy with the opposing litigants be considered a "policy" of any kind. *Wolfenbarger* does not support Holloway's position.

The other cases relied upon by Holloway are inapposite. For example, *Dennis v. Sparks*, 449 U.S. 24, 101 S.Ct. 183, 66 L.Ed.2d 185 (1980), although factually similar to the case at bar, antedated the *Parratt/Hudson* rule entirely and discussed only the issue of whether private parties who conspired with an immune state court judge had acted "under color of state law." Of even less relevance is *Cleveland Board of Education v. Loudermill*, ___ U.S. ___, 105 S.Ct. 1487. ___ L.Ed.2d ___ (1985), which dealt with the question of what predeprivation process is due a public employee who may be terminated only for cause. It was the "established state procedure" itself that was challenged in *Loudermill* and thus the *Parratt/Hudson* rule, which was not mentioned by either the majority or the dissent, clearly did not apply.

[8] Where a state system as a whole provides due process of law, federal constitutional guarantees are not breached merely because some state employee, even a highly-placed one, might engage in tortious conduct either intentionally or negligently. To avoid such needless federal interference and thereby to preserve the balance between the state and federal courts is the important purpose served by the *Parrett/Hudson* doctrine. Logic and prior precedent of this circuit require that we give *Parratt/Hudson* a reading broad enough to effectuate this important purpose. Therefore, we decline to adopt the restrictive interpretations urged by plaintiffs. The petition for rehearing is

DENIED.

APPENDIX G

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 85-1289

D.C. Docket No. CA-3-82-1846-II

PAT S. HOLLOWAY,

Plaintiff-Appellant,

versus

JUDGE DEE BROWN WALKER,
ET AL.,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Texas

Before CLARK, Chief Judge, POLITZ, and WILLIAMS,
Circuit Judges.

J U D G M E N T

This cause came on to be heard on the record on appeal and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the District Court in this cause is affirmed.

IT IS FURTHER ORDERED that plaintiff-appellant pay to defendants-appellees the costs on appeal, to be taxed by the Clerk of this Court.

March 19, 1986

ISSUED AS MANDATE: JUN 9 1986